MONTANA LEGISLATIVE HISTORY

Chapter 443 19 91

Bill H 139 S _____ Original bill & history ✓C

H. Committee on Appropriations		S. Committee on Financial Claims	
Hearing Date(s) Feb 04	✓C	Hearing Date(s) Mar 06	✓C
Feb 14	✓C	Mar 10	✓C
_____	___C	_____	___C
_____	___C	_____	___C
Date Out _____	___C		

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

1997 LEGISLATIVE HISTORY

The 1997 Montana Legislature has dramatically changed the nature of the legislative minutes. Specifically, the minutes from House committees are extremely sparse in content, offering no substantive information from which to glean legislative intent. The Senate committees' minutes are somewhat fuller in content. Exhibits available from the State Law Library (which may include written statements, attendant information, roll call votes, roll call attendance, a list of public members present, specific action taken on legislative bills, etc.) are included with this request. For information on other exhibits, contact the Montana Historical Society Archives at 444-4774. Exhibits may also be purchased on a CD-ROM from the Montana Legislative Council (444-3064).

Just as in the 1995 legislative session, the House and Senate hearings were recorded. The Historical Society is the depository for the tapes. For information on accessing the tapes, call the archives at 444-4774.

If you have concerns over the format of the 1997 legislative minutes, it is suggested that you contact your state legislators.

1/17	FISCAL NOTE RECEIVED		
1/17	FISCAL NOTE PRINTED		
3/10	TABLED IN COMMITTEE		
3/16	MISSED DEADLINE FOR 57TH DAY TRANSMITTAL DIED IN COMMITTEE		

HB 139 INTRODUCED BY SWANSON *LC0319 DRAFTER: NISS*

REVISE THE LAW RELATING TO PUBLIC CONTRACTS

BY REQUEST OF DEPARTMENT OF ADMINISTRATION

12/31	INTRODUCED		
1/03	FISCAL NOTE REQUESTED		
1/06	FIRST READING		
1/06	REFERRED TO APPROPRIATIONS		
1/13	FISCAL NOTE RECEIVED		
1/14	FISCAL NOTE PRINTED		
1/16	FISCAL NOTE PRINTED		
2/04	HEARING		
2/17	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/19	2ND READING PASSED	75	25
2/20	3RD READING PASSED	77	23
	TRANSMITTED TO SENATE		
2/21	FIRST READING		
2/21	REFERRED TO FINANCE & CLAIMS		
3/04	REVISED FISCAL NOTE REQUESTED		
3/05	REVISED FISCAL NOTE RECEIVED		
3/05	REVISED FISCAL NOTE PRINTED		
3/06	HEARING		
3/11	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/13	2ND READING CONCURRED	40	10
3/14	3RD READING CONCURRED	39	10
	RETURNED TO HOUSE WITH AMENDMENTS		
4/14	2ND READING AMENDMENTS CONCURRED	89	9
4/15	3RD READING CONCURRED AS AMENDED	77	22
4/20	SIGNED BY SPEAKER		
4/25	SIGNED BY PRESIDENT		
4/25	TRANSMITTED TO GOVERNOR		
4/30	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 443		
	EFFECTIVE DATE: 04/30/97—SECTIONS 2, 10 & 22-24		
	EFFECTIVE DATE: 10/01/97—SECTIONS 1, 3-9 & 11-21		

B 140 INTRODUCED BY KRENZLER *LC0691 DRAFTER: BOHYER*

CHANGE THE DATE ON WHICH ELECTED COUNTY OFFICERS TAKE OFFICE

12/31	INTRODUCED		
1/03	FISCAL NOTE REQUESTED		
1/06	FIRST READING		
1/06	REFERRED TO LOCAL GOVERNMENT		
1/13	FISCAL NOTE RECEIVED		
1/14	FISCAL NOTE PRINTED		
1/16	HEARING		
1/16	TABLED IN COMMITTEE		
2/21	TAKEN FROM COMMITTEE AND PLACED ON 2ND READING		
2/25	2ND READING PASSED AS AMENDED	95	1
2/26	3RD READING PASSED	98	0
	TRANSMITTED TO SENATE		
3/03	FIRST READING		
3/03	REFERRED TO LOCAL GOVERNMENT		

3/18	HEARING		
3/22	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/27	2ND READING CONCURRED	40	0
3/28	3RD READING CONCURRED	48	0
	RETURNED TO HOUSE WITH AMENDMENTS		
4/09	2ND READING AMENDMENTS CONCURRED	98	0
4/11	3RD READING CONCURRED AS AMENDED	94	2
4/17	SIGNED BY SPEAKER		
4/18	SIGNED BY PRESIDENT		
4/18	TRANSMITTED TO GOVERNOR		
4/28	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 421		
	EFFECTIVE DATE: 10/01/97		

HB 141 INTRODUCED BY KEENAN, ET AL. *LC0949 DRAFTER: PETESCH*

REVISE ADMINISTRATIVE FUNCTIONS CONCERNING THE SUPREME COURT

BY REQUEST OF LEGISLATIVE AUDIT COMMITTEE

12/31	INTRODUCED		
1/06	FIRST READING		
1/06	REFERRED TO JUDICIARY		
1/13	HEARING		
1/16	COMMITTEE REPORT—BILL PASSED		
1/17	2ND READING PASSED	97	1
1/18	3RD READING PASSED	96	1
	TRANSMITTED TO SENATE		
1/20	FIRST READING		
1/20	REFERRED TO JUDICIARY		
1/31	HEARING		
1/31	COMMITTEE REPORT—BILL CONCURRED		
2/13	2ND READING CONCURRED	50	0
2/14	3RD READING CONCURRED	50	0
	RETURNED TO HOUSE		
2/18	SIGNED BY SPEAKER		
2/19	SIGNED BY PRESIDENT		
2/20	TRANSMITTED TO GOVERNOR		
2/21	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 28		
	EFFECTIVE DATE: 10/01/97		

HB 142 INTRODUCED BY KASTEN, ET AL. *LC0775 DRAFTER: HEFFELFINGER*

EXTEND THE MONTANA UNIVERSITY SYSTEM OPTIONAL RETIREMENT PROGRAM TO UNIVERSITY SYSTEM EMPLOYEES ELIGIBLE FOR MEMBERSHIP UNDER THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

BY REQUEST OF BOARD OF REGENTS

12/31	INTRODUCED		
1/03	FISCAL NOTE REQUESTED		
1/06	FIRST READING		
1/06	REFERRED TO STATE ADMINISTRATION		
1/14	FISCAL NOTE RECEIVED		
1/15	REVISED FISCAL NOTE RECEIVED		
1/16	FISCAL NOTE PRINTED		
1/24	HEARING		
2/18	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/21	2ND READING PASSED	66	30
2/26	3RD READING PASSED	81	18

HOUSE BILL NO. 139

INTRODUCED BY SWANSON

BY REQUEST OF THE DEPARTMENT OF ADMINISTRATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE LAW RELATING TO PUBLIC CONTRACTS; AMENDING MONTANA PROCUREMENT LAWS; ELIMINATING PREFERENCES IN THE PROCUREMENT PROCESS; MODERNIZING STATE PROCUREMENT PROCEDURE BY PROVIDING OPTIONS FOR SOURCE SELECTION, CLARIFYING TERMS AND PROCEDURES, AND STREAMLINING THE STATE PROCUREMENT PROCESS; STATUTORILY APPROPRIATING THE PROCEEDS OF SALES OF PROPERTY; PROVIDING EXCLUSIVE REMEDIES FOR UNLAWFUL SOLICITATIONS OR AWARDS; PROVIDING FOR THE PROCUREMENT OF CONSULTING SERVICES IN THE SAME MANNER AS OTHER SERVICES ARE PROCURED; AMENDING SECTIONS 7-14-2404, 7-14-2406, 7-14-2716, 17-7-502, 18-1-101, 18-4-122, 18-4-123, 18-4-126, 18-4-132, 18-4-133, 18-4-141, 18-4-224, 18-4-231, 18-4-241, 18-4-242, 18-4-302, 18-4-303, 18-4-304, 18-4-305, 18-4-309, 18-4-310, 18-4-312, 18-4-313, 18-4-402, 18-5-308, 18-6-101, 18-7-104, 18-7-105, 18-8-211, 53-1-203, 53-30-505, AND 60-2-112, MCA; REPEALING SECTIONS 18-1-102, 18-1-103, 18-1-106, 18-1-111, 18-1-112, 18-1-113, 18-1-114, 18-4-131, 18-4-225, 18-4-234, 18-7-107, 18-8-101, 18-8-102, 18-8-103, 18-8-104, 18-8-105, 18-8-106, 18-8-111, AND 18-8-112, MCA; AND PROVIDING EFFECTIVE DATES AND A RETROACTIVE APPLICABILITY DATE."

WHEREAS, the Montana Supreme Court held in ISC Distributors, Inc. v. Trevor, 273 M 185, 903 P2d 170 (1995), that an unsuccessful bidder on a state contract may sue the state for money damages under Title 18, chapter 4, MCA, commonly known as the Montana Procurement Act; and

WHEREAS, a judgment for damages in a state contract suit brought pursuant to the Montana Procurement Act makes Montana taxpayers pay twice for the same product; and

WHEREAS, in enacting the Montana Procurement Act, the Legislature did not intend to allow disappointed bidders on state contracts to be awarded damages under the Montana Procurement Act, but rather intended that the exclusive remedies of a disappointed bidder be the remedies provided in section 18-4-242, MCA, which do not include the award of money damages to an unsuccessful bidder; and

WHEREAS, the Montana Supreme Court held in Meech v. Hillhaven West, Inc., 238 M 21, 776 P2d 488 (1989), that no fundamental right to a particular cause of action or remedy exists under Montana law

(b) All bids must be sealed. Each bidder shall meet the requirements of Title 18, chapter 1, part 2.

(2) The board may reject any ~~and all~~ bids. If a contract is awarded, the board shall ~~do so~~ award the contract in accordance with the requirements of ~~18-1-102, 18-1-112, and~~ Title 18, chapter 2, part 4. When there is no prevailing rate of wages set by collective bargaining, the board shall determine the prevailing rate to be stated in the contract. The contract must be entered with the unanimous consent of the members of the board.

(3) Before entering upon performance of the work, the contractor shall comply with the requirements of Title 18, chapter 2, part 2. For the purposes of those sections with relation to contracts with the board, a contract ~~shall not be~~ is not completed until the board, while formally convened, affirmatively accepts all of the work ~~thereunder~~ done under the contract."

Section 3. Section 7-14-2716, MCA, is amended to read:

"**7-14-2716. Award of contract by local improvement district.** (1) If the committee awards a contract, it shall do so in accordance with the requirements of ~~18-1-102, 18-1-112, and~~ Title 18, chapter 2, part 4. When there is no prevailing rate of wages set by collective bargaining, the committee shall determine the prevailing rate to be stated in the contract.

(2) Partial payments may be provided for in the contract and paid when certified by the county surveyor and committee."

Section 4. Section 17-7-502, MCA, is amended to read:

"**17-7-502. Statutory appropriations -- definition -- requisites for validity.** (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations: 2-9-202; 2-17-105;

2-18-812; 3-5-901; 5-13-403; 10-3-203; 10-3-310; 10-3-312; 10-3-314; 10-4-301; 15-1-111; 15-23-706; 15-30-195; 15-31-702; 15-37-117; 15-38-202; 15-65-121; 15-70-101; 16-1-404; 16-1-410; 16-1-411; 16-11-308; 17-3-106; 17-3-212; 17-5-404; 17-5-424; 17-5-804; 17-6-101; 17-6-201; 17-7-304; 18-6-101; 18-11-112; 19-2-502; 19-6-709; 19-9-1007; 19-17-301; 19-18-512; 19-18-513; 19-18-606; 19-19-205; 19-19-305; 19-19-506; 20-8-107; 20-8-111; 20-9-361; 20-26-1503; 23-5-136; 23-5-306; 23-5-409; 23-5-610; 23-5-612; 23-5-631; 23-7-301; 23-7-402; 32-1-537; 37-43-204; 37-51-501; 39-71-503; 39-71-907; 39-71-2321; 39-71-2504; 44-12-206; 44-13-102; 50-4-623; 50-5-232; 50-40-206; 53-6-150; 53-6-703; 53-24-206; 60-2-220; 67-3-205; 75-1-1101; 75-5-1108; 75-6-214; 75-11-313; 76-12-123; 80-2-103; 80-2-222; 80-4-416; 81-5-111; 82-11-136; 82-11-161; 85-1-220; 85-20-402; 90-3-301; 90-4-215; 90-6-331; 90-7-220; 90-7-221; and 90-9-306.

(4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory appropriation authority for the payments. (In subsection (3): pursuant to sec. 7, Ch. 567, L. 1991, the inclusion of 19-6-709 terminates upon death of last recipient eligible for supplemental benefit; and pursuant to sec. 7(2), Ch. 29, L. 1995, the inclusion of 15-30-195 terminates July 1, 2001.)"

Section 5. Section 18-1-101, MCA, is amended to read:

"**18-1-101. Definitions.** ~~(1)~~ Unless the context requires otherwise, in this title, ~~"department"~~ the following definitions apply:

(1) "Department" means the department of administration provided for in Title 2, chapter 15, part 10.

~~(2) Unless the context requires otherwise, in this part the following definitions apply:~~

~~(a) "Goods" means supplies, equipment, materials, commodities, and specially manufactured products.~~

~~(b) "Montana-made" means manufactured or produced in this state and made with the:~~

~~(i) use of parts, materials, or supplies of which 50% or more were manufactured or produced in~~

~~this state; or~~

~~(ii) employment of persons of whom 50% or more are bona fide residents of Montana as defined in 18-2-401.~~

~~(c) "Nonresident bidder" means a bidder whose residence is not in this state as determined under 18-1-103.~~

~~(d)~~ "Public agency" means a department, commission, council, board, bureau, committee, institution, agency, government corporation, or other entity, instrumentality, or official of the legislative, executive, or judicial branch of this state and its political subdivisions, including the board of regents and the Montana university system.

~~(e) "Resident bidder" means a bidder whose residence is in this state as determined under 18-1-103.~~

(3) "Written" means that whenever written or in-writing determinations or documents are required, the public agency responsible for the procurement may specify an appropriate visual medium, such as by computer transmission or by facsimile machine transmission, in the specifications, contract, or rules of the public agency."

Section 6. Section 18-4-122, MCA, is amended to read:

"**18-4-122. Purpose.** The underlying purposes and policies of this chapter are to:

(1) simplify, clarify, and modernize the law governing procurement by the state of Montana;

(2) permit the continued development of procurement policies and practices;

(3) make as consistent as possible the procurement laws among the various jurisdictions;

(4) provide for increased public confidence in the procedures followed in public procurement;

(5) ~~ensure the fair and equitable treatment of all persons who deal with the procurement system of the state~~ provide the exclusive remedies for unlawful bid solicitations or contract awards;

(6) provide increased economy in state procurement activities and maximize to the fullest extent practicable the purchasing value of public funds of the state; and

(7) foster effective, broad-based competition within the free enterprise system~~; and~~

~~(8) provide safeguards for the maintenance of a procurement system of quality and integrity~~."

Section 7. Section 18-4-123, MCA, is amended to read:

"**18-4-123. Definitions.** In this chapter, unless the context clearly requires otherwise or a different meaning is prescribed for a particular section, the following definitions apply:

(1) "Business" means a corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture, or other private legal entity.

(2) "Change order" means a written order, signed by an authorized department representative, directing the contractor to make changes which the changes clause of the contract authorizes the department to order without the consent of the contractor.

(3) "Contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies or services.

(4) "Contract modification" means a written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished by mutual action of the parties to the contract.

(5) "Contractor" means a person having a contract with a governmental body.

(6) "Data" means recorded information, regardless of form or characteristic.

(7) "Department" means the department of administration.

(8) "Designee" means ~~a duly~~ an authorized representative of a person holding a superior position.

(9) "Director" means the director of the department of administration.

(10) "Employee" means an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing personal services for a governmental body.

(11) "Governmental body" means a department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other entity, instrumentality, or official of the executive, legislative, or judicial branch of this state, including the board of regents and the Montana university system.

(12) "Grant" means the furnishing by the federal government of assistance, whether financial or otherwise, to a person or agency to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies or services. A contract resulting from ~~such~~ an award is not a grant but a procurement contract.

(13) "Person" means any business, individual, union, committee, club, other organization, or group of individuals.

(14) "Printing" means the reproduction of an image from a printing surface generally made by a

contact impression that causes a transfer of ink or the reproduction of an impression by a photographic process and includes graphic arts, typesetting, binding, and other operations necessary to produce a finished printed product. Printing does not include rebinding or repair by a library or an office, department, board, or commission ~~thereof~~ of books, journals, pamphlets, magazines, and literary articles held as a part of its library collection.

(15) "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services. It also includes all functions that pertain to the obtaining of any supply or service, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

(16) "Procurement officer" means any person ~~duly~~ authorized to enter into and administer contracts and make written determinations with respect ~~thereto~~ to contracts. The term also includes an authorized representative acting within the limits of ~~his~~ the representative's authority.

(17) "Purchasing agency" means any governmental body, other than the department, ~~which~~ that is authorized by this chapter or its implementing rules or by way of delegation from the director to enter into contracts.

(18) "Services" means the furnishing of labor, time, or effort by a contractor~~, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance~~. The term does not include ~~consulting services as defined in 18-8-102, those services listed in 18-8-103,~~ employment agreements or collective bargaining agreements, the provision ~~by providers~~ of human services ~~regulated by a state agency~~ administered by the department of public health and human services, or services related to construction contracts.

(19) "Supplies" means all property except as otherwise provided by law, including but not limited to equipment, materials, printing, and commodities, and excluding land or any interest in land.

(20) "Using agency" means any governmental body of the state ~~which~~ that ~~utilizes~~ uses any supplies or services procured under this chapter.

(21) "Vendor" means a person who offers or may offer supplies or services to a public agency."

Section 8. Section 18-4-126, MCA, is amended to read:

"**18-4-126. Public access to procurement information -- records -- retention.** (1) Procurement information is a public writing and must be available to the public as provided in 2-6-102 and 18-4-304.

(2) All procurement records must be retained, managed, and disposed of in accordance with the state records management program, Title 2, chapter 6.

(3) Written determinations required by this chapter must be retained in the appropriate official contract file of the department or the purchasing agency administering the procurement in accordance with the state records management program."

Section 9. Section 18-4-132, MCA, is amended to read:

"**18-4-132. Application.** (1) ~~Except as provided in 18-4-313, which applies retroactively to telecommunications equipment and systems and data processing equipment acquired under existing contracts, leases, or rental agreements, and subject to the terms of such agreements, this chapter applies only to contracts solicited or entered into after January 1, 1984, unless the parties agree to its application to a contract solicited or entered into prior to January 1, 1984.~~

~~(2)~~ This chapter applies to expenditure of public funds irrespective of their source, including federal assistance money, by this state acting through a governmental body, as defined in 18-4-123, under any contract~~;~~. ~~but this~~ This chapter does not apply to either grants or contracts between the state and its political subdivisions or other governments, except as provided in part 4. This chapter also applies to the disposal of state supplies. ~~Nothing in this~~ This chapter or ~~in~~ rules adopted ~~thereunder~~ pursuant to this chapter ~~prevents~~ do not prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

~~(3)~~(2) This chapter does not apply to construction contracts.

~~(4)~~(3) This chapter does not apply to expenditures of or the authorized sale or disposal of equipment purchased with money raised by student activity fees designated for use by the student associations of the university system.

~~(5)~~(4) This chapter does not apply to contracts entered into by the Montana state lottery that have an aggregate value of less than $250,000.

(5) This chapter does not apply to employment of:

(a) a registered professional engineer, surveyor, real estate appraiser, or registered architect;

(b) a physician, dentist, pharmacist, or other medical, dental, or health care provider;

(c) an expert witness hired for use in litigation, a hearings officer hired in rulemaking and contested case proceedings under the Montana Administrative Procedure Act, or an attorney as specified by executive

order of the governor;

(d) consulting actuaries;

(e) a private consultant employed by the student associations of the university system with money raised from student activity fees designated for use by those student associations;

(f) a private consultant employed by the Montana state lottery;

(g) a private investigator licensed by any jurisdiction; or

(h) a claims adjuster."

Section 10. Section 18-4-133, MCA, is amended to read:

"**18-4-133. Purchases exempt from general requirements.** (1) ~~Fresh fruits and vegetables, other than potatoes, may not be included in the supplies to be purchased as provided in this chapter. The department may allow a state agency or institution to purchase fresh fruits and vegetables. An itemized account must be kept of these purchases, and the account must be furnished to the department.~~

~~(2)~~ When immediate delivery of articles or performance of service is required by the public exigencies, the articles or service required may be procured by open purchase or contract at the place and in the manner in which the articles are usually bought and sold or the services engaged between individuals but under the direction of the department.

~~(3)~~(2) The department ~~of administration~~ may exempt the department of corrections and the department of public health and human services from the provisions of this chapter for the purchase of suitable clothing by the department of corrections and the department of public health and human services for residents of its institutions and community-based programs.

~~(4)~~(3) As used in this section, "suitable clothing" means styled, seasonable clothing, which will allow the resident to make a normal appearance in the community."

Section 11. Section 18-4-141, MCA, is amended to read:

"**18-4-141. Contract transfers and collusion prohibited -- violations and penalty.** (1) ~~No~~ A contract or order or any interest ~~therein~~ in a contract or order may not be transferred, assigned, or subcontracted by the party to whom the contract or order is given to any other party without the express written approval of the state, and the state may declare void any unapproved transfer, assignment, or subcontract. ~~No approval of a transfer, assignment, or subcontract may release the original obligor or his sureties from their~~

~~obligations to the state under the contract or order.~~

(2) Collusion or secret agreements between bidders for the purpose of securing any advantage to the bidders as against the state in the awarding of contracts is prohibited. The state may declare the contract void if the department finds sufficient evidence after a contract has been let that the contract was obtained by a bidder or bidders by reason of collusive or secret agreement among the bidders to the disadvantage of the state.

(3) All rights of action for a breach of a contract by the contracting parties are reserved to the state.

(4) A person who violates the provisions of 2-2-201 or this section, or both, is guilty of a misdemeanor and shall be fined not less than $500 or more than $5,000, and the state of Montana may at its option declare any contract in violation of the provisions of 2-2-201 or this section, or both, void ab initio."

Section 12. Section 18-4-224, MCA, is amended to read:

"**18-4-224. Contract clauses -- rules.** (1) The department may ~~adopt rules permitting or requiring,~~ in its discretion, permit or require the inclusion of clauses providing for adjustments in prices, time of performance, or other appropriate contract provisions relating to the following subjects:

(a) the unilateral right of the state to order in writing:

(i) changes in the work within the scope of the contract; and

(ii) temporary work stoppage or delay of performance; and

(b) variations occurring between estimated quantities of work in a contract and actual quantities.

(2) Adjustments in price pursuant to clauses established under subsection (1) must be computed in one or more of the following ways:

(a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon ~~thereafter~~ after commencement of performance as practicable;

(b) by unit prices specified in the contract or subsequently agreed upon;

(c) by the costs attributable to the events or situations under ~~such~~ clauses established under subsection (1) with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon; or

(d) in ~~such~~ any other manner as the contracting parties may mutually agree~~; or~~

~~(c) in the absence of agreement by the parties, by a unilateral determination by the state of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the state in accordance with applicable sections of the rules adopted under 18-4-225~~.

(3) The department may ~~adopt rules permitting or requiring~~ , in its discretion, permit or require the inclusion in state contracts of clauses providing for appropriate remedies and relating to the following subjects:

(a) liquidated damages, as appropriate;

(b) specified excuses for delay or nonperformance;

(c) termination of the contract for default; and

(d) termination of the contract, in whole or in part, for the convenience of the state.

(4) The director or the head of a purchasing agency may vary the clauses established by the department under subsections (1) and (3) for inclusion in any particular state contract. Any variations must be supported by a written determination that states the circumstances justifying ~~such~~ the variation. Notice of any material variation must be stated in the invitation for bids or request for proposals.

(5) Regardless of a provision in a contract, the department may accept a lower price or better value offered by a contractor."

Section 13. Section 18-4-231, MCA, is amended to read:

"**18-4-231. Definition of specification.** As used in 18-4-231 through ~~18-4-234~~ 18-4-233, "specification" means any description of the physical or functional characteristics or of the nature of a supply or service. It may include a description of any requirement for inspecting, testing, or preparing a supply or service for delivery."

Section 14. Section 18-4-241, MCA, is amended to read:

"**18-4-241. Authority to remove or suspend ~~from vendors' list~~ vendor.** (1) The department may remove a ~~person~~ vendor for cause from consideration for award of contracts by the state. ~~The removal may not be for a period of more than 3 years.~~

(2) The department may temporarily suspend a ~~person~~ vendor from consideration for award of contracts if there is probable cause to believe that the ~~person~~ vendor has engaged in activities that may lead to removal. ~~The suspension may not be for a period exceeding 3 months unless~~ If an indictment has

been issued for an offense that would be a cause for removal under subsection (3), ~~in which case~~ the suspension must, at the request of the attorney general, remain in effect at a minimum until after the trial of the suspended ~~person~~ vendor. The authority to remove or suspend must be exercised in accordance with rules adopted by the department.

(3) The causes for removal or suspension include the following:

(a) violation of contract provisions, as set forth in subsections (3)(a)(i) and (3)(a)(ii), of a character ~~which~~ that is regarded by the department to be so serious as to justify removal action:

(i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for removal;

(b) failure to respond to a number of solicitations over a period of time as determined by the department in accordance with rules~~, and after adequate written notice to the affected person of the intent to remove or suspend~~ or failure to provide the department with a correct address;

(c) any other cause that the department determines to be so serious and compelling as to affect responsibility as a state contractor, including removal by another governmental entity ~~for any cause listed in the department's rules~~; and

(d) failure to comply with the provisions of Title 39, chapter 51, or Title 39, chapter 71.

(4) The department shall issue a written decision to remove or suspend a vendor, stating the reasons for the action taken, for reasons other than those reasons provided in subsection (3)(b). A copy of the decision must be mailed or otherwise furnished immediately to the ~~person~~ vendor involved."

Section 15. Section 18-4-242, MCA, is amended to read:

"18-4-242. ~~Remedies prior to and after award~~ **Exclusive remedies for unlawful solicitation or award.** (1) ~~If~~ This section establishes the exclusive remedies for a solicitation or award of a contract ~~is~~ determined to be in violation of the law~~, the~~.

(2) Except for small purchases or limited solicitations made pursuant to 18-4-305, a bidder, offeror, or contractor aggrieved in connection with the solicitation or award of a contract may protest to the department. The protest must be submitted to the department in writing no later than 14 days after

execution of the contract.

(3) If the protest is not resolved by mutual agreement, the department shall issue in writing a decision on the protest within 30 days after receipt of the protest. The decision must:

(a) state the reason for the action taken by the department with regard to the contract; and

(b) inform the aggrieved party of the party's right to request, within 14 days after the date of the department's written decision, a contested case hearing pursuant to the Montana Administrative Procedure Act.

(4) In a protest or contested case proceeding, the department may ~~apply the remedies~~, in an appropriate case, order a remedy provided in ~~subsections (2) and (3)~~ subsection (5) or (6).

~~(2)~~(5) If ~~prior to~~ before an award it is determined that a solicitation or proposed award of a contract is in violation of law, the solicitation or proposed award ~~must~~ may be:

(a) canceled; or

(b) revised to comply with the law.

~~(3)~~(6) (a) If after an award it is determined that a solicitation or award of a contract is in violation of law and the person awarded the contract has not acted fraudulently or in bad faith, the contract may be:

(i) ratified and affirmed, provided it is determined that doing so is in the best interests of the state; or

(ii) terminated, and the person awarded the contract must be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, ~~prior to~~ before the termination.

(b) If after an award it is determined that a solicitation or award of a contract is in violation of law and the person awarded the contract has acted fraudulently or in bad faith, the contract may be:

(i) declared void; or

(ii) ratified and affirmed if ~~such~~ that action is in the best interests of the state, without prejudice to the state's rights to appropriate damages.

~~(4) In the event the matter is reviewed by a court, the court may apply the same remedies provided in subsections (2) and (3).~~

(7) The exclusive method of judicial review of a solicitation or award by the department pursuant to this chapter is by a petition for judicial review pursuant to 2-4-702. In a proceeding pursuant to that section, the court may, in an appropriate case, order a remedy provided by subsection (5) or (6) of this

section. Except as provided in subsections (6)(a)(ii) and (6)(b)(ii), there is no right under any legal theory to recover a form of damages or expenses for a solicitation or award of a contract in violation of law. Any other claim, cause of action, or request for relief for solicitations of awards allegedly made in violation of law may not be heard or granted by a district court other than as provided in this section.

(8) The state is not required to delay, halt, or modify the procurement process pending the result of a protest, contested case proceeding, or judicial review.

(9) The department may adopt rules governing the protest of solicitations and awards."

Section 16. Section 18-4-302, MCA, is amended to read:

"**18-4-302. Methods of source selection.** (1) Unless otherwise authorized by law, all state contracts for supplies and services must be awarded by ~~competitive sealed bidding, pursuant to 18-4-303, except as provided in 18-4-133, 18-4-304 through 18-4-306, chapters 5 and 8 of~~ a source selection method provided for in this title~~, and subsections (2) and (3) of this section~~. Supplies or services offered for sale, lease, or rental by public utilities are exempt from this requirement if the prices of the supplies or services are regulated by the public service commission or other governmental authority.

(2) At the time that the department or ~~a purchasing~~ another agency opens bids or proposals, if a supplier's current publicly advertised or established catalog price is received at or before the time that the bids or proposals are opened and is less than the bid of the lowest responsible and responsive bidder or offeror or improves upon the conditions for the best proposal received using the same factors and weights included in the proposal, the department or ~~purchasing~~ agency may reject all bids and purchase the supply from that supplier without meeting the requirements of 18-4-303 through 18-4-306.

(3) An office supply procured by the department's central stores program ~~through bulk purchase or procured under a term contract~~ may be purchased by ~~a purchasing~~ an agency, without meeting the requirements of 18-4-303 through 18-4-306, from a supplier whose publicly advertised price, established catalog price, or discount price offered to the ~~purchasing~~ agency is less than the price offered by the central stores program ~~or under the term contract~~ if the office supply conforms in all material respects to the terms, conditions, and quality offered by the central stores program ~~or under the term contract~~. A state office supply term contract must include a provision by which the contracting parties acknowledge and agree to the provisions of this subsection.

(4) A contract for supplies or services, or both, may be negotiated, in accordance with department

rules and with the approval of the department director, directly with a vendor without using competitive sealed bidding or a competitive sealed proposal. A contract may be awarded pursuant to this section only when it is advantageous to the state to use direct negotiation in the procurement of new or unique requirements of the state, in the procurement of new technologies, or to achieve best net value.

(5) The department may, on behalf of a state agency, participate in, sponsor, conduct, or administer a contract or other business relationship in a cooperative purchase pursuant to 18-4-402 with one or more public agencies, nonprofit organizations, or business entities if the department determines the contract or relationship to be in the best interests of the state."

Section 17. Section 18-4-303, MCA, is amended to read:

"**18-4-303. Competitive sealed bidding.** (1) An invitation for bids must be issued and must include a purchase description and conditions applicable to the procurement.

(2) Adequate public notice of the invitation for bids must be given a reasonable time ~~prior to~~ before the date set forth ~~therein~~ in the invitation for the opening of bids, in accordance with rules adopted by the department. Notice may include publication in a newspaper of general circulation at a reasonable time ~~prior to~~ before the bid opening.

(3) Bids must be opened publicly ~~in the presence of one or more witnesses~~ at the time and place designated in the invitation for bids. Each bidder has the right to be present, either in person or by agent, when the bids are opened and has the right to examine and inspect all bids. The amount of each bid and ~~such~~ other relevant information as may be specified by rule, together with the name of each bidder, must be recorded. The record must be open to public inspection. After the time of award, all bids and bid documents must be open to public inspection in accordance with the provisions of 2-6-102 and are subject to the requirements of subsection (4).

(4) Bids must be available for public inspection when the bids are opened if:

(a) the invitation for bids is issued by a state agency to contract with the private sector to provide services currently conducted by state employees; and

(b) acceptance of bids would result in the displacement of five or more state employees.

(5) Bids must be unconditionally accepted without alteration or correction, except as authorized in this chapter. Bids must be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery,

and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award must be objectively measurable, such as discounts, transportation costs, and total or life-cycle costs. The invitation for bids ~~shall~~ must set forth the evaluation criteria to be used. Only criteria set forth in the invitation for bids may be used in bid evaluation.

(6) Correction or withdrawal of inadvertently erroneous bids, before or after award, or cancellation of awards or contracts based on ~~such~~ bid mistakes may be permitted in accordance with rules adopted by the department. After bid opening, ~~no~~ changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition may not be permitted. Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids or to cancel awards or contracts based on bid mistakes must be supported by a written determination made by the department.

(7) The contract must be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids~~, including the preferences established by Title 18, chapter 1, part 1~~. If all bids exceed available funds as certified by the appropriate fiscal officer and the low ~~responsive and~~ responsible and responsive bid does not exceed ~~such~~ the funds by more than 5%, the director or the head of a purchasing agency ~~is authorized~~ may, in situations ~~where~~ in which time or economic considerations preclude resolicitation of a reduced scope, ~~to~~ negotiate an adjustment of the bid price, including changes in the bid requirements, with the low ~~responsive and~~ responsible and responsive bidder in order to bring the bid within the amount of available funds.

(8) When it is considered impractical to initially prepare a purchase description to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers, to be followed by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation."

Section 18. Section 18-4-304, MCA, is amended to read:

"**18-4-304. Competitive sealed proposals.** (1) ~~When, under rules adopted by the department, the director, the head of a purchasing agency, or a designee of either officer above the level of the procurement officer determines that the use of competitive sealed bidding is either not practicable or not advantageous to the state, a contract may be entered into by competitive sealed proposals. The department may provide by rule that it is either not practicable or not advantageous to the state to procure specified types of~~

~~supplies and services by competitive sealed bidding.~~ The department may procure supplies and services through competitive sealed proposals.

(2) Proposals must be solicited through a request for proposals.

(3) Adequate public notice of the request for proposals must be given in the same manner as provided in 18-4-303(2).

(4) Proposals must be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals must be prepared in accordance with rules adopted by the department and must be open for public inspection after contract award. After the contract is executed, proposal documents may be inspected by the public, subject to the limitations of the Uniform Trade Secrets Act, Title 30, chapter 14, part 4.

(5) The request for proposals must state the evaluation factors and their relative importance ~~of price and other evaluation factors~~. The award must be made to the responsible and responsive offeror whose proposal best meets the evaluation criteria. Other factors or criteria may not be used in the evaluation. The contract file must demonstrate the basis on which the award is made.

(6) ~~As provided in the request for proposals and under rules adopted by the department, discussions with responsible offerors who submit apparently responsive proposals may be conducted for the purpose of clarification in order to assure full understanding of and responsiveness to the solicitation requirements. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted, after submissions and prior to award, for the purpose of obtaining best and final offers.~~ The department may discuss a proposal with an offeror for the purpose of clarification or revision of the proposal. In conducting discussions, there may not be disclosure of any information derived from proposals submitted by competing offerors. ~~The department may require the submission of cost or pricing data in connection with an award under this section.~~

~~(7) The award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price, including the preference in 18-1-102, and the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation. The contract file must contain the basis on which the award is made.~~"

Section 19. Section 18-4-305, MCA, is amended to read:

"**18-4-305. Small purchases and limited solicitations**. Any procurement not exceeding the amount

established by rule may be made in accordance with small purchase or limited solicitation procedures established by the department. Procurement requirements may not be artificially divided so as to constitute a small purchase or limited solicitation under this section."

Section 20. Section 18-4-309, MCA, is amended to read:

"**18-4-309. Prequalification of suppliers.** Prospective suppliers may be prequalified in accordance with department rules for particular types of supplies and services. ~~Solicitation mailing lists of potential contractors must include but not be limited to such prequalified suppliers.~~"

Section 21. Section 18-4-310, MCA, is amended to read:

"**18-4-310. Types of contracts.** ~~Subject to the limitations of this section, any~~ Any type of contract that will promote the best interests of the state may be used~~, except that the use of a cost-plus-percentage-of-cost contract is prohibited. A cost reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the state than any other type or that it is impracticable to obtain the supplies or services required except under such a contract~~."

Section 22. Section 18-4-312, MCA, is amended to read:

"**18-4-312. Bid and contract performance security.** (1) For state contracts for the procurement of services or of supplies, the department may in its discretion require:

(a) bid security;

(b) contract performance security to guarantee the faithful performance of the contract and the payment of all laborers, suppliers, ~~materialmen,~~ mechanics, and subcontractors; or

(c) both bid and contract performance security.

(2) If security is required under subsection (1), the following types of security may be required to be deposited with the state:

(a) a sufficient bond with a licensed surety company as surety;

(b) an irrevocable letter of credit not to exceed $100,000 in accordance with the provisions of Title 30, chapter 5, part 1;

(c) money of the United States;

(d) a cashier's check, certified check, bank money order, certificate of deposit, money market

certificate, or bank draft that is drawn or issued by a federally chartered or state-chartered bank or savings and loan association that is insured by or for which insurance is administered by the federal deposit insurance corporation or that is drawn and issued by a credit union insured by the national credit union share insurance fund.

(3) The amount and type of the security must be determined by the department to be sufficient to cover the risk involved to the state. The security must be payable to the state of Montana ~~and~~. Contract performance security must remain in effect for the entire contract period. In determining the amount and type of contract performance security required for each contract, the department shall consider the nature of the performance and the need for future protection to the state. In determining the need for and amount of bid security, the department shall consider the risks involved to the state if a successful bidder or offeror fails to enter into a formal contract. The considerations must include but are not limited to the type of supply or service being procured, the dollar amount of the proposed contract, and delivery time requirements. The department may adopt rules to assist it in making these determinations and in protecting the state in dealing with irrevocable letters of credit. Bid and contract security requirements must be included in the invitations for bids or requests for proposals.

(4) If a bidder or offeror to whom a contract is awarded fails or refuses to enter into the contract or provide contract performance security, as required by the invitation for bid or request for proposal, after notification of award, the department may, in its discretion, require the bidder to forfeit the bid security to the state and become immediately liable on the bid security, but not in excess of the sum stated in the security. The liability of the bidder or offeror, the maker of the security or bid bond, or the liability on the bid bond or other security may not exceed the amount specified in the invitation for bid or request for proposal.

(5) Negotiable instruments provided as bid security must be refunded to those bidders or offerors whose bids or proposals are not accepted.

(6) The provisions of Title 18, chapter 1, part 2, and Title 18, chapter 2, parts 2 and 3, do not apply to procurements under this chapter."

Section 23. Section 18-4-313, MCA, is amended to read:

"18-4-313. Contracts -- terms, extensions, and time limits. (1) ~~Unless otherwise provided by law, a contract, lease, or rental agreement for supplies or services may not be made for a period of more than~~

~~7 years. However, the department may contract for the lease or purchase of telecommunications equipment and systems, data processing equipment, the department of revenue liquor agencies, and the department of public health and human services medicaid management information system (MMIS) for a period not to exceed 10 years. A contract, lease, or rental agreement may be extended or renewed if the terms of the extension or renewal, if any, are included in the solicitation, if funds are available for the first fiscal period at the time of the agreement, and if the total contract period, including any extension or renewal, does not exceed 7 years. Payment and performance obligations for succeeding fiscal periods are subject to the availability and appropriation of funds for the fiscal periods.~~ Unless otherwise provided by law, a contract, lease, or rental agreement for supplies or services may be made for a specific duration determined by the department to obtain the best net value for the state.

(2) ~~Prior to~~ Before the issuance, extension, or renewal of a contract, it must be determined that:

(a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(3) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled."

Section 24. Section 18-4-402, MCA, is amended to read:

"**18-4-402. Cooperative purchasing authorized.** The department may participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any supplies or services with one or more public procurement units in accordance with an agreement entered into between the participants independent of the requirements of part 3. ~~Such cooperative~~ Cooperative purchasing may include purchasing through federal supply schedules of the United States general services administration, joint or ~~multi-party~~ multiparty contracts between public procurement units and open-ended state public procurement unit contracts that are made available to local public procurement units."

Section 25. Section 18-5-308, MCA, is amended to read:

"**18-5-308. Construction with other sections.** Procurement from small businesses under this part is subject to all other statutes governing state procurement and all rules ~~promulgated thereunder~~ adopted

pursuant to this part, as now or ~~hereafter~~ later amended, except that in case of conflict this part governs ~~and the provisions set forth in 18-1-102, 18-1-111, and 18-1-112 shall not apply~~."

Section 26. Section 18-6-101, MCA, is amended to read:

"**18-6-101. Power to sell state property -- proceeds credited to ~~general~~ fund from which property was purchased.** (1) The department has exclusive power, subject to the approval of the governor, to sell or otherwise dispose of or to authorize the sale or other disposition of all materials and supplies, service equipment, or other personal property of every kind owned by the state but not needed or used by any state institution or by any department of state government.

(2) Unless otherwise provided by law, the department shall credit the ~~general~~ fund from which the property was purchased, less a reasonable handling fee, with ~~all~~ the money received from a sale. The proceeds of the sale are statutorily appropriated, as provided in 17-7-502, to the agency that owned the property before it was sold by the department.

~~(3) Whenever the personal property was accounted for in an enterprise or internal service fund or designated subfund account, the proceeds of the sale shall be credited to the appropriate enterprise or internal service fund or designated subfund account.~~"

Section 27. Section 18-7-104, MCA, is amended to read:

"**18-7-104. Union label.** All printing for which the state of Montana is chargeable ~~shall~~ must bear the label of the branch of the international typographical union, the allied printing trades council, or the amalgamated lithographers of America of the locality in which it is printed, except under the following conditions. Printing firms not having the use of the labels and who ~~are desirous of presenting bids~~ want to bid for printing ~~as enumerated above~~ shall ~~be required to~~ establish consideration as a responsible bidder as follows:

(1) As a condition to consideration as a responsible bidder, printing concerns ~~must~~ shall file with the secretary of state a sworn statement to the effect that employees ~~in the employ~~ of the concern ~~which~~ that is to produce ~~such~~ the printing are receiving the prevailing wage rate and are working under conditions prevalent in the locality in which the work is produced.

(2) ~~Whenever~~ If a collective bargaining agreement is in effect between an employer and employees who are represented by a responsible organization ~~which~~ that is in no way influenced or controlled by the

management, ~~such~~ the collective bargaining agreement ~~and its provisions shall~~ must be construed as conditions prevalent in ~~said~~ the locality and ~~shall be~~ is the minimum requirement for being ~~adjudged~~ considered a responsible bidder under ~~this section, 18-7-107, or~~ chapter 4 ~~of this title~~ or this section.

(3) Printing firms ~~having the use of~~ using the union labels, as ~~set forth above shall be deemed as having~~ provided in subsection (1), have complied with the provisions of ~~this section, 18-7-107, or~~ chapter 4 or this section ~~of this title, but nothing in these provisions shall be construed as exempting such~~. However, this section does not exempt the bidders from ~~any~~ the provisions of ~~this section, 18-7-107, or~~ chapter 4 ~~of this title~~ or this section, and ~~such~~ the bidders shall ~~also be required to~~ conform to ~~all~~ the provisions ~~thereof~~ of chapter 4 and this section."

Section 28. Section 18-7-105, MCA, is amended to read:

"**18-7-105. Penalty.** Any officer of the state who ~~shall accept any~~ accepts printed matter for which the state is chargeable in whole or in part or who ~~is found to have~~ has had printed matter produced, under conditions other than as set forth in chapter 4 ~~of this title,~~ or 18-7-104~~, or 18-7-107 shall be~~, is subject to a fine of $50 for each ~~and every~~ offense."

Section 29. Section 18-8-211, MCA, is amended to read:

"**18-8-211. Coordination with other statutes.** (1) This part need not be complied with by an agency when the contracting authority makes a finding in accordance with this or any other applicable law that an emergency requires the immediate execution of the work involved. ~~Nothing in this~~ This part ~~relieves~~ does not relieve the contracting authority from complying with applicable law limiting emergency expenditures.

(2) The limitation on the preparation of working drawings contained in 18-2-111 applies to this part.

(3) The procedure for appointment of architects and consulting engineers pursuant to 18-2-112 applies to this part, except that the agency shall select its proposed list of three architects or consulting engineers in accordance with this part prior to submission to the department of administration.

~~(4) The exception for services estimated to cost less than $5,000 in 18-8-105 applies to this part.~~"

Section 30. Section 53-1-203, MCA, is amended to read:

"**53-1-203. Powers and duties of department of corrections.** (1) The department of corrections shall:

(a) adopt rules necessary to carry out the purposes of 41-5-527 through 41-5-529 and rules for the admission, custody, transfer, and release of persons in department programs except as otherwise provided by law. However, rules adopted by the department may not amend or alter the statutory powers and duties of the state board of pardons and parole.

(b) subject to the functions of the department of administration, lease or purchase lands for use by institutions and classify those lands to determine those that may be most profitably used for agricultural purposes, taking into consideration the needs of all institutions for the food products that can be grown or produced on the lands and the relative value of agricultural programs in the treatment or rehabilitation of the persons confined in the institutions;

(c) contract with private, nonprofit Montana corporations to establish and maintain community-based prerelease centers for purposes of preparing inmates of the Montana state prison who are approaching parole eligibility or discharge for release into the community. The centers shall provide a less restrictive environment than the prison while maintaining adequate security. The centers must be operated in coordination with other department correctional programs, including the supervised release program provided for in Title 46, chapter 23, part 4. This subsection does not affect the department's authority to operate and maintain community-based prerelease centers.

(d) utilize the staff and services of other state agencies and units of the Montana university system, within their respective statutory functions, to carry out its functions under this title;

(e) propose programs to the legislature to meet the projected long-range needs of institutions, including programs and facilities for the diagnosis, treatment, care, and aftercare of persons placed in institutions;

(f) encourage the establishment of programs at the local and institutional level for the rehabilitation and education of adult felony offenders;

(g) administer all state and federal funds allocated to the department for youth in need of supervision and delinquent youth, as defined in 41-5-103;

(h) collect and disseminate information relating to youth in need of supervision and delinquent youth;

(i) maintain adequate data on placements that it funds in order to keep the legislature properly

informed of the specific information, by category, related to youth in need of supervision and delinquent youth in out-of-home care facilities;

(j) provide funding for and place youth who are alleged or adjudicated to be delinquent or in need of supervision and who are referred or committed to the department;

(k) administer youth correctional facilities;

(l) provide supervision, care, and control of youth released from a state youth correctional facility; and

(m) use to maximum efficiency the resources of state government in a coordinated effort to:

(i) provide for children in need of temporary protection or correctional services; and

(ii) coordinate and apply the principles of modern institutional administration to the institutions in the department.

(2) ~~The department and a private, nonprofit Montana corporation may not enter into a contract under subsection (1)(c) for a period that exceeds 10 years.~~ The provisions of 18-3-104 ~~and 18-4-313~~ that limit the term of a contract do not apply to a contract authorized by subsection (1)(c).

(3) The department of corrections may enter into contracts with nonprofit corporations or associations or private organizations to provide substitute care for youth in need of supervision and delinquent youth in youth care facilities."

Section 31. Section 53-30-505, MCA, is amended to read:

"**53-30-505. Contract time limit.** ~~A contract entered into under 53-30-504 may not exceed a term of 30 years and must contain provisions for renegotiation after 30 years.~~ The provisions of 18-3-104 ~~and 18-4-313~~ that limit the term of a contract do not apply to a contract authorized by 53-30-504."

Section 32. Section 60-2-112, MCA, is amended to read:

"**60-2-112. Competitive bidding.** (1) Except as provided in subsections (2) through (4), when the estimated cost of any work exceeds $50,000, the commission shall let the contract by competitive bidding to the lowest responsible and responsive bidder. Award must be made upon the notice and terms that the commission prescribes by its rules. ~~However, except when prohibited by federal law, the commission shall make awards and contracts in accordance with 18-1-102 and 18-1-112.~~

(2) The commission may let a contract by means other than competitive bidding if it determines

that special circumstances so require. The commission shall specify the special circumstances in writing.

(3) The commission may enter into contracts with units of local government for the construction of projects without competitive bidding if it finds that the work can be accomplished at lower total costs, including total costs of labor, materials, supplies, equipment usage, engineering, supervision, clerical and accounting services, administrative costs, and reasonable estimates of other costs attributable to the project.

(4) The commission may delegate to the department the authority to enter, without competitive bidding, agreed-upon price contracts for projects costing $50,000 or less."

NEW SECTION. **Section 33. Repealer.** Sections 18-1-102, 18-1-103, 18-1-106, 18-1-111, 18-1-112, 18-1-113, 18-1-114, 18-4-131, 18-4-225, 18-4-234, 18-7-107, 18-8-101, 18-8-102, 18-8-103, 18-8-104, 18-8-105, 18-8-106, 18-8-111, and 18-8-112, MCA, are repealed.

NEW SECTION. **Section 34. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 35. Retroactive applicability.** [Sections 6 and 15] and the repeal of 18-4-131 apply retroactively, within the meaning of 1-2-109, in the case of an unlawful solicitation for bid or unlawful award of a contract, to a claim, to a cause of action, or to a request for relief other than those authorized by [section 15], unless a final judgment awarding damages has been rendered regarding that claim, cause of action, or request for relief prior to [the effective date of this act].

NEW SECTION. **Section 36. Effective dates.** (1) Except as provided in subsection (2), [this act] is effective October 1, 1997.

(2) [Sections 6, 15, 34, and 35 and this section] and the repeal of 18-4-131 are effective on passage and approval.

-END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0139, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:
A bill that generally revises the law relating to public contracts.

ASSUMPTIONS:
1. Cost savings due to procurement reform processes cannot be measured with any degree of accuracy.
2. Potential damages paid out as a result of litigation by disappointed vendors cannot be estimated.
3. In FY96, the state paid approximately $59,000 more to second lowest bidders over lowest bidders due to procurement preferences. In most cases, this amount represents funds that remained in-state rather than going out-of-state. Accordingly, Montana corporation and/or individual taxes paid on these funds would provide an offsetting factor. Therefore, because the amount varies, as does the tax factor, a reasonable estimate of the impact of removing the procurement preference cannot be made.
4. General funded agencies would now receive an appropriation equal to the proceeds from the sale of their surplus property instead of the funds being deposited directly to the general fund, resulting in a potential loss to the general fund of approximately $110,000 per year. Non-general fund agencies and programs already retain their sale proceeds.
5. Procedures will have to be developed to ensure statutory appropriations requested by agencies do not exceed the sales proceeds deposited in the general fund, and to live within the limitations of the current appropriation control and accounting systems.

FISCAL IMPACT:

Expenditures:

	FY98	FY99
General Fund Expenditures	$110,000	$110,000
Net Impact on Fund Balance	($110,000)	($110,000)

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:
Local governments and school districts may save an undetermined amount of money by not paying the extra costs associated with procurement preferences. But see assumption #3 above.

Dave Lewis 1-12-97
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Emily Swanson 1/13/97
EMILY SWANSON, PRIMARY SPONSOR DATE

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0139, second reading

DESCRIPTION OF PROPOSED LEGISLATION:
An act to generally revise the Montana Procurement Act.

ASSUMPTIONS:

1. Cost savings due to procurement reform processes cannot be measured with any degree of certainty.
2. The bill, as amended, retains current law procurement preferences and does not provide for new statutory appropriations to agencies for the net proceeds from sales of surplus property. Therefore, there is no fiscal impact related to either of those items.

FISCAL IMPACT:
The fiscal impact, if any, cannot be measured with any degree of certainty.

Dave Lewis 3-5-97
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Emily Swanson 3-5-97
EMILY SWANSON, PRIMARY SPONSOR DATE

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0139, as revised

DESCRIPTION OF PROPOSED LEGISLATION:
A bill that generally revises the law relating to public contracts.

ASSUMPTIONS:
1. Cost savings due to procurement reform processes cannot be measured with any degree of accuracy.
2. Potential damages paid out as a result of litigation by disappointed vendors cannot be estimated.
3. The cost to the state of $59,000 (actual cost in FY95-96) due to procurement preferences only reflects the extra costs paid by the state Purchasing Bureau. Data is not available for what the preferences cost the University system, some state agencies, or local governments and school districts. Future cost saving cannot be estimated because what will be procured is unknown. If preferences are eliminated, the state would avoid these costs.
4. General funded agencies would now receive an appropriation equal to the proceeds from the sale of their surplus property instead of the funds being deposited directly to the general fund, resulting in a potential loss to the general fund of approximately $110,000 per year. Non-general fund agencies and programs already retain their sale proceeds.
5. Procedures will have to be developed to ensure statutory appropriations requested by agencies do not exceed the sales proceeds deposited in the general fund, and to live within the limitations of the current appropriation control and accounting systems.

FISCAL IMPACT:

Expenditures:

	FY98	FY99
General Fund Expenditures	$110,000	$110,000
Net Impact on Fund Balance	($110,000)	($110,000)

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:
Local governments and school districts may save an undetermined amount of money by not paying the extra costs associated with procurement preferences. But see assumption #3 above.

Dave Lewis 1-16-97
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Emily Swanson 1/16/97
EMILY SWANSON, PRIMARY SPONSOR DATE

Fiscal Note for HB0139, as revised
Rev. HB 139-#2

HOUSE BILL NO. 139

INTRODUCED BY SWANSON

BY REQUEST OF THE DEPARTMENT OF ADMINISTRATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE LAW RELATING TO PUBLIC CONTRACTS; AMENDING MONTANA PROCUREMENT LAWS; ~~ELIMINATING PREFERENCES IN THE PROCUREMENT PROCESS;~~ MODERNIZING STATE PROCUREMENT PROCEDURE BY PROVIDING OPTIONS FOR SOURCE SELECTION, CLARIFYING TERMS AND PROCEDURES, AND STREAMLINING THE STATE PROCUREMENT PROCESS; ~~STATUTORILY APPROPRIATING THE PROCEEDS OF SALES OF PROPERTY;~~ PROVIDING EXCLUSIVE REMEDIES FOR UNLAWFUL SOLICITATIONS OR AWARDS; PROVIDING FOR THE PROCUREMENT OF CONSULTING SERVICES IN THE SAME MANNER AS OTHER SERVICES ARE PROCURED; AMENDING SECTIONS ~~7-14-2404, 7-14-2406, 7-14-2716, 17-7-502,~~ 18-1-101, 18-4-122, 18-4-123, 18-4-126, 18-4-132, 18-4-133, 18-4-141, 18-4-224, ~~18-4-231,~~ 18-4-241, 18-4-242, 18-4-302, 18-4-303, 18-4-304, 18-4-305, 18-4-309, 18-4-310, 18-4-312, ~~18-4-313,~~ 18-4-402, ~~18-5-308, 18-6-101, 18-7-104, 18-7-105,~~ 18-8-211, ~~53-1-203, 53-30-505,~~ AND 60-2-112, MCA; REPEALING SECTIONS ~~18-1-102, 18-1-103, 18-1-106, 18-1-111, 18-1-112, 18-1-113, 18-1-114,~~ 18-4-131, 18-4-225, ~~18-4-234, 18-7-107,~~ 18-8-101, 18-8-102, 18-8-103, 18-8-104, 18-8-105, 18-8-106, 18-8-111, AND 18-8-112, MCA; AND PROVIDING EFFECTIVE DATES ~~AND~~, A RETROACTIVE APPLICABILITY DATE, AND A TERMINATION DATE."

THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE REPRINTED. PLEASE REFER TO SECOND READING COPY (YELLOW) FOR COMPLETE TEXT.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON APPROPRIATIONS

Call to Order: By **CHAIRMAN TOM ZOOK**, on February 4, 1997, at 3:00 p.m., in Room 312.

ROLL CALL

Members Present:

Rep. Tom Zook, Chairman (R)
Rep. Edward J. "Ed" Grady, Vice Chairman (Majority) (R)
Rep. Joe Quilici, Vice Chairman (Minority) (D)
Rep. Beverly Barnhart (D)
Rep. Ernest Bergsagel (R)
Rep. Roger DeBruycker (R)
Rep. Gary Feland (R)
Rep. Don Holland (R)
Rep. John Johnson (D)
Rep. Royal C. Johnson (R)
Rep. Betty Lou Kasten (R)
Rep. Bob Keenan (R)
Rep. William T. "Red" Menahan (D)
Rep. Ray Peck (D)
Rep. Steve Vick (R)
Rep. William R. Wiseman (R)

Members Excused: Rep. John Cobb (R)
Rep. Matt McCann (D)

Members Absent: None.

Staff Present: Clayton Schenck, Legislative Fiscal Division
Marjorie Peterson, Committee Secretary

Committee Business Summary:
Hearing: HB 139
Executive Action: None.

HEARING ON HB 139

Opening Statement by Sponsor:
REP. EMILY SWANSON, HD 30, Bozeman, opened the hearing on HB 139, An act generally revising the law relating to public contracts, amending Montana procurement laws, eliminating preferences in the procurement process. She read a letter from former Representative Francis Bardanouve from Harlem. **EXHIBIT 1.**
{Tape: 1; Side: A; Approx. Tape Counter: 0.4.}

Proponents:
Lois Menzies, Director, Department of Administration, Helena. She offered her written testimony. **EXHIBIT 2.**
{Tape: 1; Side: A; Approx. Tape Counter: 9.4.}

Marvin Eicholtz, Administrator, Procurement and Printing Division, Department of Administration, Helena. Mr. Eicholtz gave a slide presentation on the bid and proposal process and an explanation of bid reform. He offered his written testimony and a Section-by-Section Comparison to Current Law on the Procurement Reform Bill. He also submitted a copy of the slides he showed the committee. **EXHIBITS 3, 4.**
{Tape: 1; Side: A; Approx. Tape Counter: 12.2.}

Tony Herbert, Administrator, Information Services Division, Department of Administration, Helena. Mr. Herbert offered his written testimony. **EXHIBIT 5.**
{Tape: 1; Side: A; Approx. Tape Counter: 24.7.}

Bill Gianoulias, Chief Defense Counsel, Department of Administration, Helena. Mr. Gianoulias offered his written testimony. **EXHIBIT 6.**
{Tape: 1; Side: A; Approx. Tape Counter: 33.3.}

Rosie Keller, University of Montana.
{Tape: 1; Side: A; Approx. Tape Counter: 39.9.}

Jim Campbell, City of Billings.
{Tape: 1; Side: A; Approx. Tape Counter: 40.8.}

Laurence Hubbard, State Compensation Insurance Fund, Department of Administration, Helena.
{Tape: 1; Side: A; Approx. Tape Counter: 42.1.}

Barbara Larsen, University of Montana. She offered written testimony from Peter Leech, Rural Institute on Disabilities, Missoula. **EXHIBIT 7.**
{Tape: 1; Side: A; Approx. Tape Counter: 42.8.}

Opponents:
Thane Johnson, Attorney for ISC Distributors, Inc., the unsuccessful bidder who is bringing suit against the Department of Administration. Mr. Johnson submitted a copy of 2-9-108 - 111, MCA, Liability Exposure and Insurance Coverage; a copy of a letter to Mike Price from the Department of Administration; a copy of a letter to Nyla Adams, from the Office of Systems and Computing Services, Montana State University; and a copy of a Vendor-ISC page from April 25, 1991. **EXHIBITS 8, 9, 10, 11.**
{Tape: 1; Side: B; Approx. Tape Counter: 0.7.}

Scott Johnson, ISC Distributors, Inc.
{Tape: 1; Side: B; Approx. Tape Counter: 12.8.}

Riley Johnson, National Federation of Independent Businesses.
{Tape: 1; Side: B; Approx. Tape Counter: 22.3.}

Bill DeWolf, Butte Produce Co., Butte.
{Tape: 1; Side: B; Approx. Tape Counter: 25.5.}

Carl Schweitzer, Montana Contractors Association, Helena. Mr. Schweitzer offered a copy of Sec. 18-1-102, MCA, State contracts to lowest bidder. **EXHIBIT 12.**
{Tape: 1; Side: B; Approx. Tape Counter: 29.0.}

Mike Hitchcock, Montana Broom and Brush Co., Butte.
{Tape: 1; Side: B; Approx. Tape Counter: 31.2.}

David Owen, Montana Chamber of Commerce, Helena.
{Tape: 1; Side: B; Approx. Tape Counter: 32.6.}

Neil Johnson, Cutbank.
{Tape: 1; Side: B; Approx. Tape Counter: 34.1.}

Questions From the Committee:
{Tape: 1; Side: B; Approx. Tape Counter: 35.4.}

Closing by Sponsor:
REP. SWANSON closed the hearing on HB 139.
{Tape: 2; Side: A; Approx. Tape Counter: 29.4.}

EXHIBIT 1
DATE 2-4-97
HB 139

Hon. Emily Swanson
Capitol Station
Helena, Mt. 59620

Dear Rep. Swanson:

I have been informed by the Dept. of Administration that you are sponsoring H.B. 139 which amends the Montana procurement section of the Montana Code. They have asked me to send my recollection of the original enactment of this law. I was on the state administration committee and it's sub-committee that approved H.B. 493 in 1983.

House Bill 493 was the model procurement act. It was legislation that standardized the purchasing process throughout the United States. Model legislation is carefully designed to meet problems in various areas of government.

Montana at that time did not have clear guidelines on resolution of disputes in the bidding process. One of the purposes of H.B. 493 was to permit loosing bidders that felt there had been unfairness in awarding bids to negotiate with the bidding agency to cancel the bid award and rebid.

2/

If the bidding agency refused they could ask a district judge for relief. If the judge felt the process had been unfair he (she) could order the awarded bid cancelled and the state should have a re-bid of the disputed bid award.

There never was any consideration given to awarding monetary damages. I do not like to criticize court decisions but feel this action is a serious example of judicial legislating. The legislature has not amended this legislation to award monetary damages. If the legislature desires to award financial damages it should do so in legislation enacted by the legislature.

Under the court decision suits could be fought for years through the court system in the hope of securing large awards. The state of Montana can ill afford these long drawn out and costly legal battles. H.B. 139 will return the law to its original intent. The procurement act as now — no longer model legislation as Montana is the only state that awards damages. I fear the possible costs of the legal suit filed recently against the $4/00,000,000 mental health contract award. I would appreciate it if you would give Rep. Swanson's H.B. 139 careful consideration.

Sincerely,
Francis Bardanouve

EXHIBIT 2
DATE 2-4-97
HB 139

TESTIMONY ON HOUSE BILL NO. 139

House Appropriations Committee
Submitted by Lois Menzies, Director,
Department of Administration
February 4, 1997

The Department of Administration has requested several pieces of substantive legislation this session. This bill represents the most comprehensive and far-reaching proposal within our 1997 legislative package. It is our best effort to modernize and reengineer the state's practices for buying products and services.

It seems as if we are always asking government to be run more like a private business. We talk about the need to be more competitive, more business-like, and more efficient. One study in Texas compared the cost of procurement in the public sector with the private sector. It found that governments spend an average of 5.5 cents to process every dollar of procurement, while the private sector spends just 1 cent per dollar to do the same. HB 139 brings the procurement process more in line with private sector practices and with what's happening in the public sector throughout the nation. It is important to note that this bill is not on the bleeding edge of procurement reform. The changes that we are proposing have been tested and proven successful in other states.

HB 139 is particularly important in the area of information technology. As you well know, state government is highly dependent on technology for the delivery of services to our customers. We have found that our current procurement laws do not allow us to keep pace with the rapid changes in technology. This bill will give us some important tools to take advantage of appropriate technological changes.

Since adoption of the Montana Procurement Act fourteen years ago, there has not been much reform in the area of public procurement. The law simply has not kept pace with significant changes that have occurred in government and the marketplace. It is now time for a tune-up. We believe the benefits of procurement reform are clear and compelling. We urge your support for this bill.

WILSON JONES

EXHIBIT 3
DATE 2-4-97
HB 139

Exhibit #3 - Testimony Supporting HB 139 / Procurement Reform Bill
The full exhibit is available from:
MT Historical Society Archives
225 North Roberts
P. O. Box 201201
Helena, MT 59602-1201
Phone: (406) 444-4775

EXHIBIT 4
DATE 2-4-97
HB 139

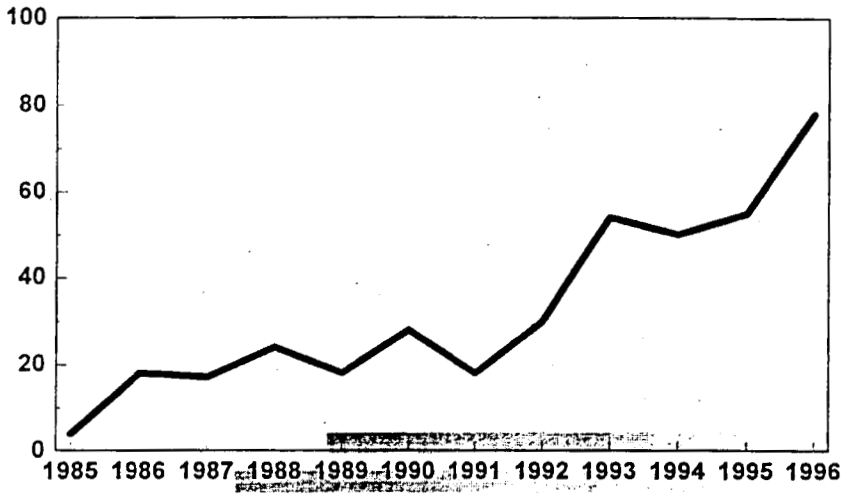
House Bill 139

An Act to Generally Revise the Montana Procurement Act

The World of Public Procurement is Changing

- Before 1983, everything was based on "low bid"
- Adoption of the Montana Procurement Act in 1983
- Fourteen years later, different needs, but a call for a better process

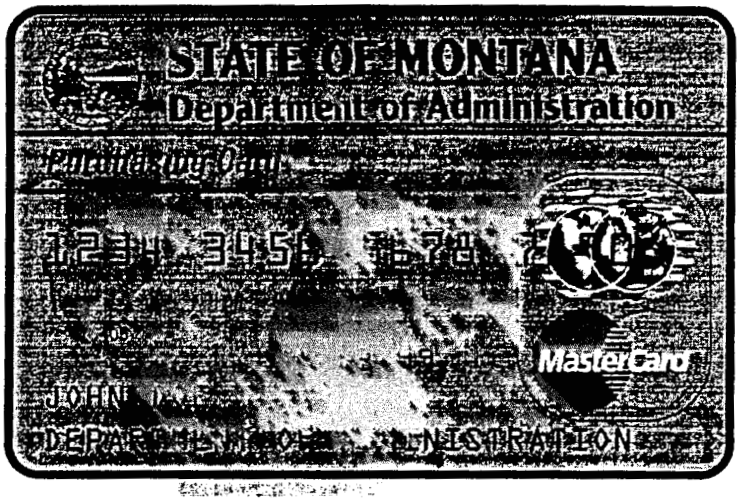
Increased Use of Competitive Sealed Proposal Method of Procurement Instead of "Low Bid"



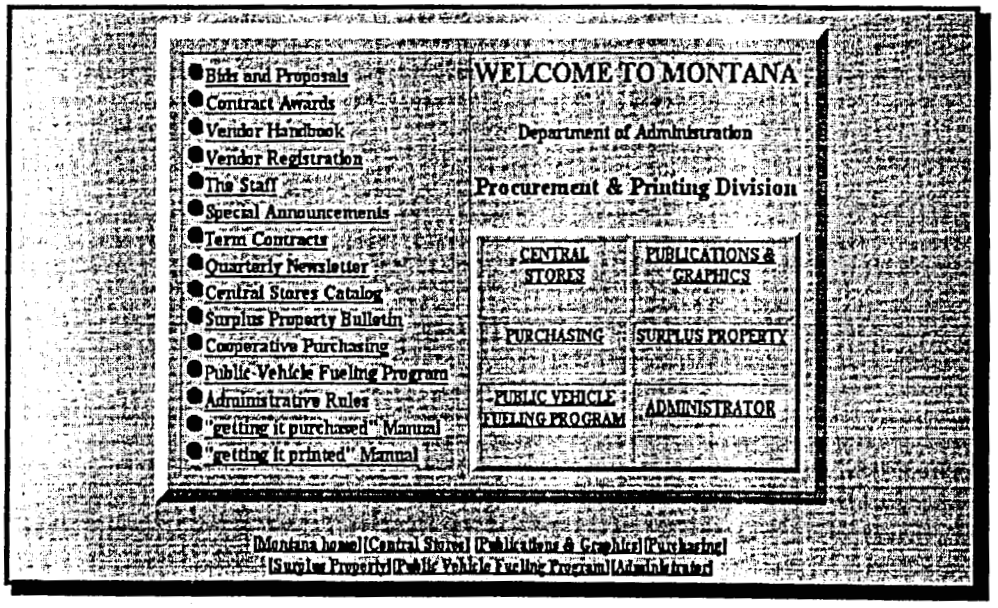
Procurement in 1997

- Reduced focus on small dollar procurements
- More focus on complex procurements
- Innovative techniques to purchase information technology
- Use of information technology to purchase supplies and services

State of Montana Procurement Card



Procurement & Printing Division Home Page on the Internet



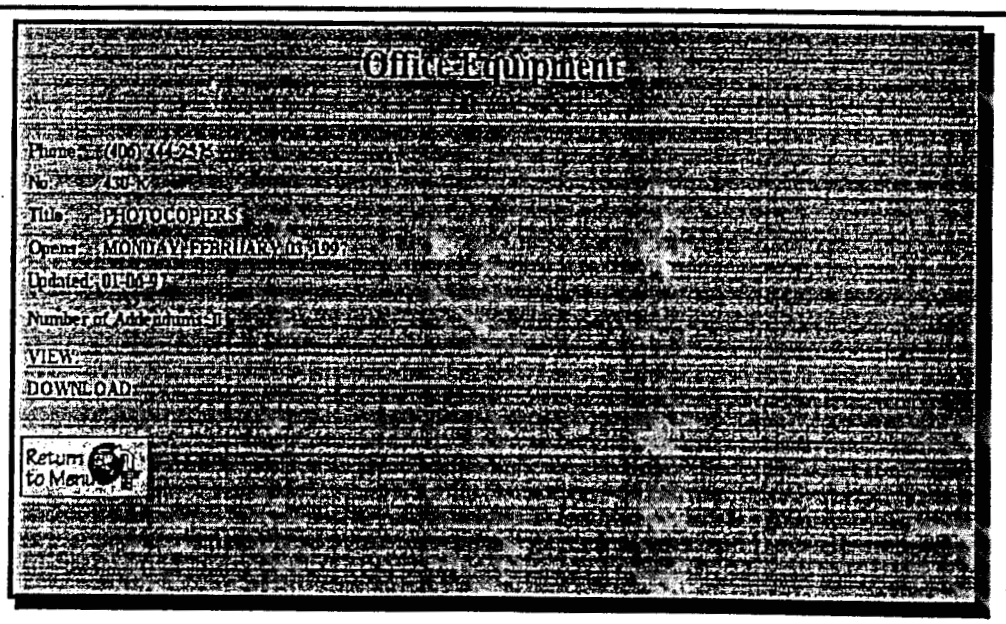
Bids and Proposals

INVITATION FOR BIDS AND REQUEST FOR PROPOSALS

- Computer Hardware, Software and Related Services
- Fuel
- Furniture
- General
- Heavy Equipment and Implement
- Laboratory, Medical Supplies and Equipment
- Office Equipment
- Office Supplies
- Printing
- Services
- Telecommunications
- Vehicles (all types of transportation)

Home Page

Office Equipment



Contract Awards

CONTRACT AWARDS

Bid Number	Date of Award	Vendor	Amount
9717-K	01/15/97	Advanced Env Tech Svcs	$30,000.00
7091-K	01/15/97	Robert Waxmans, Inc.	$ 4,197.00
7064-N	01/15/97	Juros Pharmacy & Surgical	$ 2,995.00
7079-W	01/15/97	Computerland of Helena	$ 7,223.00
7063-N	01/15/97	Hewlett-Packard Co.	$25,030.00
9721-K	01/21/97	Helicopter Wildlife Management	$50,000.00
7062-N	1/21/97	Clarks Orthopedic Supply	$ 3,939.00
7087-B	01/21/97	KING MACHINE	$55,750.00
PG2405		North Hill Web Printer's Inc.	
PG 2442		Northwinds - Great Falls	

Vendor Handbook

Vendor Handbook

State of Montana

PROCUREMENT AND PRINTING DIVISION
DEPARTMENT OF ADMINISTRATION

Table of Contents

Directory
Commonly Asked Vendor Questions
How the State of Montana Purchases
How to Respond to Bids and Proposals
General Information for the Vendor

TO ALL INTERESTED VENDORS

Procurement Reform

- Re-engineering public procurement
  - Increase procurement options
  - Remove time limits on contracts
  - Permit pre-qualification of suppliers
  - Procure "consultants" like any other "service"
  - Permit all agencies to retain the sale proceeds from their surplus property

Procurement Reform (cont.)

- Eliminate procurement preferences
  - Preferences rarely come into play
  - Preferences often take business from one Montana vendor and give it to another Montana vendor
  - Preferences rarely help Montana businesses compete against out-of-state companies
  - Our preferences are hurting Montana vendors in 31 other states
  - Preferences can't be applied if federal dollars are involved
  - The reciprocal preference on construction is nearly meaningless

Procurement Reform (cont.)

- Remedies for disappointed bidders
  - Return the law to its former interpretation prior to the Supreme Court decision in August 1995
  - Right now, "Winners win; losers sue"
  - Disappointed bidders already have remedies for wrong-doing on the part of the state in awarding contracts
  - This portion of the bill will apply retroactively

In Summary...

- $100 million per year is purchased from the private sector ... from hay bales to complex information technology systems
- Current procurement methods don't work for everything
- Focus needs to be on results, not process
- Accountability to the taxpayers and responsible expenditure of tax dollars is maintained

EXHIBIT 5
DATE 2-4-97
HB 139

Supporting Testimony for House Bill 139
Tony Herbert
House Appropriations Committee
February 4, 1997

Mr. Chairman, members of the committee, my name is Tony Herbert, and I am the Administrator of the Information Services Division of the Department of Administration. I rise before you today in support of HB139.

My testimony is going to concentrate on two important aspect of the this bill which is contained in section 16, parts (4) and (5). These sections of the bill deal with an agencies ability to better partner with the private sector to procure the best value for the state.

The Information Services Division manages many of the states complicated technology initiatives. As such, we struggle with the rapid pace of technology. We all are a part of the Information Age, whether we like it or not, and our office has to make sound decisions which have lasting value in an extremely fast moving area. However, our current procurement statutes have not necessarily reacted to this fact. Procurement of standard products is handled well by our current RFP processes, and many of our technology acquisitions continue to be managed well through our current law. However, we find ourselves at times needing more flexibility to procure new or innovative technology for the state. Section 16 part (4) provides for the flexibility for the Department Director to allow certain acquisitions to take place outside of the standard procurement practices, through direct negotiations.

We ask for this responsible flexibility to save time, which ultimately equates into money, and to be able to operate more like the private sector, something the legislature often points to as an appropriate goal for state agencies. The RFP process can take a great amount of time for our complex technologies. Now time on its own is not compelling, but when you consider the fact that we have already invested tremendous energy and time to be able to frame our questions to vendors you can start to see the problem. It is not unusual for an agency to perform extensive research into the innovation it is interested in, in order to be able to even develop the RFP document.

profit entities can make for good business sense for the state. Partnerships with companies can help the state best leverage its investments and needs in certain areas which make sense for the taxpayers, and for the private sector.

An example here is the prospect of the state and Montana Power joining together to develop a statewide radio system infrastructure which can meet the public safety radio needs of the state and the business needs of Montana Power. Very large investments would be required by both Montana Power, and by state and local agencies. The utlimate cost to all entities could be significantly reduced through a partnership effort.

Mr. Chairman, the notion of improving how we purchase technology or work with the private sector has not been invented here in Montana by Mr. Eicholtz, or by me. Purchasing and Information Technology officials from around the country, along with Harvard University have studied this issue for some time. The Brochure "Buying Smart - State Procurement Reform Saves Millions" discusses strategies other states are taking to improve information technology purchases. Other states are enacting flexible legislation which recognizes the problems, and which allows state procurement to be streamlined.

In closing let me say that the changes contemplated in HB139 are in keeping with the times. Again, much of our work will continue to be managed through the standard procurement procedures, but HB139 will provide the flexibility needed to react to events which take place and make the best decisions in innovative and complex areas.

Mr. Chairman, this concludes my testimony, and I am available to answer questions.

EXHIBIT 6
DATE 2-4-97
HB 139

DEPARTMENT OF ADMINISTRATION
RISK MANAGEMENT AND TORT DEFENSE DIVISION
MARC RACICOT, GOVERNOR
1500 EAST SIXTH—LOWER LEVEL
PO BOX 200124
STATE OF MONTANA
TELEPHONE (406) 444-2421
FAX (406) 444-2592
HELENA, MONTANA 59620-0124

February 4, 1997

TESTIMONY IN SUPPORT OF HB 139, by Bill Gianoulias, Chief Defense Counsel, Risk Management and Tort Defense Division, Department of Administration.

The retroactive provision of this bill may be applied if the intent of the legislature to do so is expressly declared. Boehm v. Alanon Club, 222 Mont. 373 (1986) and MCA § 1-2-109.

The Montana Supreme Court, in Harrison v. Chance, 244 Mont. 215 (1990) upheld MCA § 49-2-509(7) which made the Human Rights Act the exclusive remedy for sexual discrimination and dismissed plaintiff's tort claims. The tort claims had been recognized in Drinkwater v. Shipton Supply, 225 Mont. 380 (1987).

In February 1987, the Court ruled in Drinkwater that tort remedies, in addition to remedies under the Human Rights Act, existed. On April 16, § 49-2-509(7) was enacted making the Human Rights Act the exclusive remedy. The legislature expressly provided that the exclusive remedy applied to cases not brought to final judgment. All acts Harrison complained of happened before April 16, 1987. The Court ruled that Harrison's tort claims were properly dismissed under the statute.

The Harrison case provides a close parallel which supports the retroactive provision of HB 139.

Affirming, by passing HB 139, that the legislature did not and does not allow an award of money damages to an unsuccessful bidder, is good policy. If the contract was awarded improperly, it is in the public interest to have it set aside. HB 139 (as did MCA § 18-4-242) provides for rescission of the contract. This ensures that the contract will be awarded properly and that the public does not pay twice.

EXHIBIT 7
DATE 2-4-97
HB 139

The University of Montana

Montana University Affiliated
RURAL INSTITUTE ON DISABILITIES
52 Corbin Hall
The University of Montana
Missoula, Montana 59812
Voice/TDD: (406) 243-5467
FAX: (406) 243-2349

MonTECH Program
Rural Institute on Disabilities
634 Eddy Avenue
Missoula, MT 59812
(406) 243-5676

February 3, 1997

Honorable ~~John~~ Tom Zook, Chair
House Appropriations Committee
Montana State Capitol
Helena, Montana

RE: HB 139

Dear Chairman Zook and Members of the Committee:

I am the project director for Montana's Technology-Related Assistance Program for People with Disabilities, or MonTECH. I write you today because I am unable to appear in person.

My project is charged with the task of ensuring that people with disabilities have equitable access to the assistive tools they need to achieve as high a level of independence as possible. As a part of that task, we are responsible for implementing Section 508 of the Rehab Act which provides guidelines for equal access to electronic and information technology for people with disabilities. We have received an assurance from the Governor that the State will comply with Section 508.

Most importantly, in relation to HB 139, Section 508 spells out the appropriate equipment which can make it possible for people with speech, hearing, and other difficulties with communication, to compete equally with others in everyday life.

HB 139 is designed to guide State procurement of, among other things, equipment. The State is buying equipment all the time. And electronic office equipment, used to produce and convey information, is a large part of the outlay. I see here an opportunity to include a reference to Section 508 in Section 29 of the HB 139, to amend Section 18-8-211, MCA, related to coordination with other statutes. Such a

reference could then guide the rulemaking to ensure that electronic office equipment procured by the State would be equally accessible to all people with disabilities.

In general, we are in support of HB 139, but we also want to strongly encourage the inclusion of a reference to Section 508 and its' guidance for equal access.

The MonTECH Program has collected descriptive material, specifications, and model policy statements related to Section 508 of the Rehab Act which we will also be glad to provide to facilitate the procurement process. If I, or a member of my staff, can be of further assistance, please let us know.

Thank you for your attention to this matter.

Peter Leech

OFFICE OF THE GOVERNOR

STATE OF MONTANA

MARC RACICOT
GOVERNOR

STATE CAPITOL
HELENA, MONTANA 59620-0801

STATE OF MONTANA
ELECTRONIC AND INFORMATION TECHNOLOGY ACCESSIBILITY STATEMENT OF ASSURANCE

I, Marc Racicot, Governor, hereby provide assurance that state agencies will comply with the guidelines which require electronic and information technology accessibility designed to ensure, regardless of the type of medium, that individuals with disabilities can produce information and data, and have access to information and data, comparable to the information and data, and access, respectively, of individuals who are not individuals with disabilities, as established under Section 508 of the Rehabilitation Act of 1973 as amended and pursuant to 34 CFR 345.21(g), and in keeping of the spirit of The Americans with Disability Act.

The purpose of this statement is to ensure that state employees and other individuals with disabilities have equal access to electronic and information technology equal to other individuals and state employees who are not disabled.

State of Montana

Dated this 25th day of May, 1996

Marc Racicot

MARC RACICOT
Governor

Fax Note

Sent with a Hotfax fax modem.

FAX COVER SHEET

Monday, February 03, 1997 08:15:23 PM

To: MAP-Missoula
Fax #: 543-3417

Fax: 1 page and a cover page.

The Department of Administration, through rulemaking, shall develop procurement guidelines that are in compliance w/ section 508 of the Vocational Rehabilitation Act of 1973 as Amended, and pursuant 34 C.F.R. § 345.21(g).

REQUIREMENTS FOR ELECTRONIC OFFICE EQUIPMENT COMPLIANCE SECTION 508 OF THE REHAB ACT		
EQUIPMENT	**MINIMUM REQUIRED**	**RECOMMENDED**
CPU	PENTIUM 100	PENTIUM 133
RAM	16 MB	32 MB
RAM EXPANSION	128	128
EXPANSION SLOTS	2 FREE 16 BIT SLOTS	2 16 BIT SLOTS, 2 PCI SLOTS
SVGA VIDEO CARD	1 MB	2 MB
HARD DRIVE	1.6 GB	2.0 GB
SERIAL, RS232 PARALLEL PORTS	2 SERIAL 1 PARALLEL	SAME
ERGONOMICAL KEYBOARD AND MOUSE		
NETWORK		X
CDROM	8X	8X
DISK DRIVE	3 ½ HD	SAME

*WINDOWS 95 WORKS WITH MINIMAL ACCESS HARDWARE

m:\508EQP.197

The University of Montana

Montana University Affiliated
RURAL INSTITUTE ON DISABILITIES
52 Corbin Hall
The University of Montana
Missoula, Montana 59812
Voice/TDD: (406) 243-5467
FAX: (406) 243-2349

MONTECH PROGRAM
RURAL INSTITUTE ON DISABILITIES
THE UNIVERSITY OF MONTANA
634 EDDY AVENUE
MISSOULA, MONTANA 59812
406-243-5676; FAX: 406-243-4730

DATE: FEBRUARY 4, 1997

TO: BARBARA LARSEN, MonTECH FUNDING COORDINATOR

FROM: PETER LEECH, MonTECH PROJECT DIRECTOR

SUBJECT: BACKGROUND INFORMATION RE: IMPLEMENTATION OF SECTION 508 OF THE REHAB ACT IN MONTANA

Section 508 of the Rehab Act (as amended in 1992) specifies that the federal government "shall develop and establish guidelines for Federal agencies for electronic and information technology accessibility designed to ensure, regardless of the type of medium, that individuals with disabilities can produce information and data, and have access to information and data, comparable to the information and data, and access, respectively, of individuals who are not individuals with disabilities. Such guidelines shall be revised, as necessary, to reflect technological advances or changes."

The 1994 amendments to the Tech Act required that in order to qualify for extension into their fourth year, state projects get an assurance from their State's Governor that the state would comply with Section 508 of the Rehab Act in its' purchase of electronic office equipment. The MonTECH Program has done this, see attached.

Furthermore, the amendments require the state project to include a report on the progress made in the state toward implementing Section 508 as a part of their application for continuation or extension.

There has been much speculation and discussion about what Section 508 implies, and how a state might best comply. Until recently, however, there has been minimal technical assistance available that would be of use to purchasing agents in guiding their specification of electronic office equipment to be purchased.

A December 13, 1995 teleconference, sponsored by the RESNA-TA Project provided some guidance. This excerpt read as follows:

> All computer equipment purchases must be made in compliance with Section 508 of the Rehabilitation Act, and with a general view toward maintaining and furthering equal ccess. Disabled individuals and non-disabled individuals, whether faculty/staff, students or visitors, should be provided equivalent access to electronic office equipment. This accessibility is a necessary link that enables users with disabilities to function efficiently and effectively.
>
> Workstations should include a computing capacity large enough to accommodate adaptive software and hardware.
>
> Workstations for users with sensory, cognitive, or mobility impairments may be equipped with special peripherals or software such as over-sized high-resolution monitors, speech input and output, braille printers, spoken screen review, or keyboard replacement devices in order to afford equivalent access.

The materials provided for the teleconference (available in print or on disk) included a large document entitled "Excerpts from Section 508 Materials developed by the Center for Information Technology Accommodation---General Services Administration." Beginning on page 51 of this document is a section entitled "Sample Solicitation/ Contract Provisions/ Clauses for Requirements for Users With Disabilities, which lists in Section B, 1.0., the "Minimum Functional Requirements" for hardware and software that would comply with the law. This list runs through page 53. Following the teleconference, a purchasing agent in attendance said that while the list was a nice thing to have at a policy level, what he needs are specifications that can be included in a request for bids on equipment.

Since that time the MonTECH Program has developed a model that specifies the computing capacity necessary to accommodate adaptive hardware and software that would comply with Section 508. The matrix developed to present these specifications is attached. Of interest is the fact that the CPU's that currently offer the necessary capacity are little different from the up-to-date models that are on the current market.

EXHIBIT 8
DATE 2-4-97
HB 2-9-111 139
Exhibit 8

2-9-107. Repealed. Sec. 4, Ch. 22, Sp. L. June 1986.
History: En. Sec. 2, Ch. 675, L. 1983; amd. Sec. 2, Ch. 389, L. 1985.

2-9-108. Limitation on governmental liability for damages in tort. (1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $750,000 for each claim and $1.5 million for each occurrence.

(2) No insurer is liable for excess damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived.
History: En. Sec. 2, Ch. 22, Sp. L. June 1986.

2-9-109 and 2-9-110 reserved.

2-9-111. Immunity from suit for legislative acts and omissions. (1) As used in this section:

(a) the term "governmental entity" means only the state, counties, municipalities, school districts, and any other local government entity or local political subdivision vested with legislative power by statute;

(b) the term "legislative body" means only the legislature vested with legislative power by Article V of The Constitution of the State of Montana and that branch or portion of any other local governmental entity or local political subdivision empowered by law to consider and enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves;

(c) (i) the term "legislative act" means:

(A) actions by a legislative body that result in creation of law or declaration of public policy;

(B) other actions of the legislature authorized by Article V of The Constitution of the State of Montana; or

(C) actions by a school board that result in adoption of school board policies pursuant to 20-3-323(1);

(ii) the term legislative act does not include administrative actions undertaken in the execution of a law or public policy.

(2) A governmental entity is immune from suit for a legislative act or omission by its legislative body, or any member or staff of the legislative body, engaged in legislative acts.

(3) Any member or staff of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with legislative acts of the legislative body.

(4) The acquisition of insurance coverage, including self-insurance or group self-insurance, by a governmental entity does not waive the immunity provided by this section.

(5) The immunity provided for in this section does not extend to:

(a) any tort committed by the use of a motor vehicle, aircraft, or other means of transportation; or

(b) any act or omission that results in or contributes to personal injury or property damage caused by contamination or other alteration of the physical, chemical, or biological properties of surface water or ground water, for which

EXHIBIT 9
DATE 2-4-91
HB 139

DEPARTMENT OF ADMINISTRATION
PROCUREMENT & PRINTING DIVISION
PURCHASING BUREAU

STAN STEPHENS, GOVERNOR

MITCHELL BUILDING, ROOM 165

STATE OF MONTANA

(406) 444-2575

HELENA, MONTANA 59620-0135

NOTICE OF INTENT TO AWARD

CONTRACT SECURITY/WORKERS' COMPENSATION

April 22,1991

Mike Price
Computerland of Helena
25 S Last Chance Gulch
Helena MT 59601

Subject: RFP #112-B, Microcomputers Term Contract

Dear Mike:

was it really tested

The Purchasing Bureau intends to accept the bid submitted by your firm for the above referenced Request for Proposal, contingent on passing MSU's test of the IBM 486/33. It is anticipated there will be three (3) Term Contracts issued: Digital Equipment Corporation, Computerland of Helena (IBM), and Dell Marketing Corporation.

A meeting is required to finalize the terms and conditions of the term contract, hardware and software products to be included, and pricing of products and service. Information Services Division will call you to arrange a meeting date and time.

According to the terms and conditions of the Request for Proposal, no work may proceed until the contract performance security totaling $100,000.00 is received. A bond from a licensed surety company is acceptable for security in addition to those listed in Section 3.3, page 12 of RFP #112-B.

In addition, you are also required to provide the applicable certificate of Workers' Compensation Insurance or exemption certificate prior to receiving a contract. This insurance must remain in effect for the term of the contract and for any renewals. Please reference the RFP number and contract title on both the security and certificate documents.

State of Montana
MICROCOMPUTER Term Contract #318-V

May 29, 1991

This contract is effective this 29th day of May 1991. Agreement of the parties, ComputerLand of Helena (the Contractor), International Business Machines ((IBM) the subcontractor), and the State of Montana Purchasing Division (the State), with the terms, conditions and pricing as found in the attached document, is signified below.

ACCEPTED BY COMPUTERLAND OF HELENA:

Murray W Vester
Signature
Murray W. Vester
Date 5-29-91

ACCEPTED BY THE STATE OF MONTANA, DEPARTMENT OF ADMINISTRATION:

Forest V Farris
Signature
Forest V. Farris, Purchasing Agent
Date 5/29/91

ACCEPTED BY INTERNATIONAL BUSINESS MACHINES (IBM):

[signature]
Signature and Title
Authorized IBM Representative
Peter D. Aspinwall
(Please type in name & title above)
Date 5/29/91

How can IBM accept a computerland contract.
How can they get a 3% in-state prefer-

SECTION 1

INTRODUCTION

1.1 Date and Purpose

This agreement is dated May 29, 1991. The purpose of this Microcomputer Term Contract is to expedite the purchasing process for any state agency requesting microcomputers or peripherals included under the contract. Agencies which order equipment must use the procedures outlined in Section 2.

The Montana University System may place orders for like equipment under the IBM National Education Pricing (NEP) and National Educational License Fee (NELF) offers. Purchase orders should be sent directly to IBM, Helena (see address below), and will receive the same or better pricing and service as specified herein. How can this Be a computerland Contract

Any agency has the option of purchasing any equipment by competitively bidding the purchase, provided that adequate justification is provided, and approval is obtained from the Information Services Division (ISD) in the Department of Administration (DOA) in accordance with 2-17-501, Montana Codes Annotated (MCA).

1.2 Contractor/Subcontractor

Vester, Inc. dba: ComputerLand of Helena is the contractor. It shall not assign any part of this or a subsequent agreement to a third party without first obtaining the written consent of the State. ComputerLand of Helena has established a subcontractor relationship with International Business Machines (IBM), whereby IBM has licensed ComputerLand of Helena as a reseller of IBM products. IBM provides marketing, technical, sales, and financial support to ComputerLand. IBM will provide all product service, including warranty service and any other support purchased under this contract. At the time of contract issuance no other subcontractors have been proposed or approved by the state to perform under this contract. In any event, the contractor will remain responsible for performance of the obligations found in this agreement.

1.3 Liaison

1.3.1 Contractor Liaison

what is left for computerland to provide

Michael Price
ComputerLand of Helena
25 S. Last Chance Gulch
Helena, Montana 59601
Telephone (406) 443-3200
Fax (406) 443-1212

1.3.2 Subcontractor Liaison - Educational Orders Only

Susan Algard - Higher Education
Bob Foster - K-12 (Central MT)
Dee Kober - K-12 (Western MT)
Al Redman - K-12 (Eastern MT)
IBM
100 N. Park Ave.
Helena, Montana 59601
Telephone (406) 444-5000

EXHIBIT 10
DATE 2-4-97
HB 139

Montana State University
Bozeman, Montana 59717

Office of Systems and Computing Services

Telephone (406) 994-3042

September 10, 1990

Nyla Adams
State Purchasing
Sam Mitchell Building Rm 165
Helena, Montana 59620

Dear Nyla:

In response to our telephone conversation of last Friday afternoon, September 8, 1990, I have created a list of technical specifications which I request be added to the State of Montana Request for Proposal RFP# 112-B for a Microcomputers Term Contract. Inclusion of these specifications will protect existing capital investments of the Montana University System (MUS) units, the Montana University System Education Network (MUSEnet), the State of Montana Department Natural Resources and Conservation (DNRC) and the Department of Highways in Digital Equipment Corporation (DEC) computing and data communications network equipment, computer operating systems, network system software and application software systems.

I've tried to conform to the format used in the pending RFP. I think the modest changes as listed below in bold type will support compatibility with Montana University System computing and local area network environments.
The following text should be added to 7.4:

Some Montana departments and the Montana University System have standardized on the Ethernet (802.3) local area network protocol.

The following technical specifications should be added to section 8.3.3:

8.3.3 "All of hardware proposed must be compatible with latest releases(s) of the following DOS based software:"

COMMUNICATIONS SOFTWARE proposed additional language is:

DEC LanWORKS for DOS (formerly called DECnet PCSA Client for DOS)

The following technical specifications should be added to section 8.3.4:

8.3.4 "All of the hardware proposed must be compatible with latest release(s) of the following OS/2 based software:"

COMMUNICATION SOFTWARE proposed additional language is:

DEC LanWORKS for OS/2 Server (formerly PCSA for OS/2 Server)
DEC LanWORKS for OS/2 Client (formerly PCSA for OS/2 Client)

HARDWARE proposed additional language is:

DEC EtherWORKS LAN Controllers;
DEC EtherWORKS LC
DEC EtherWORKS Turbo
DEC EtherWORKS Turbo/TB
DEC EtherWORKS for MicroChannel
or, DEPCA-AA

8.4 "It is desirable that items listed in the following areas be compatible..."

Proposed additional language is:

COMMUNICATION SOFTWARE

It is desirable that the vendor's EMS driver be compatible with the DEC LanWORKS for DOS driver HIMEM>SYS which provides XMS support.

However, for ironclad protection against incompatibilities, we prefer the following text be inserted in section 8.4 under COMMUNICATION SOFTWARE:

The vendor's EMS driver should be included within the DEC LanWORKS for DOS Software Product Description (SPD 55.07.xx) System Support Addendum (SAA 55.07xx-A) which lists base system-ethernet controller-OS version combinations that have been tested and certified to be compatible with PCSA.

I appreciate your commitment to include these additional technical specifications in an addendum to RFP# 112-B and to extend the date for receipt of proposals for an additional ten (10) working days. If you have any questions or require additional clarifiation regarding these technical specifications, please to not hesitate to telephone me at (406) 994-5404.

Best regards,

Eric S. Hood

Eric S. Hood
Director of Montana State University's Systems and Computing Services
and
Executive Director of the Montana University Systems Education Network

Ref: pb esh\oscs\NAdams.let

EXHIBIT 11
DATE 2-4-97
HB 139

TOTAL POINTS EARNED = 28,175

SECTION	POINT VALUE	COMMENTS
5.1.4 Problem Resolu	2,500	For full points - available M-F, 8am-5pm, and vendor rep. avail. at mtgs. and meets response time requirements. BFO: UNDERSTANDS AND WILL COMPLY WITH CHANGES PHONE COVERAGE: 750 PTS. MEETING ATTENDANCE: 750 PTS. TECHNICAL PHONE RESPONSE: 750 PTS. ARRIVAL ON-SITE: 750 PTS. ISC IS NOW ON SITE IN HELENA TUES AND THURS. WILL ADD STAFF IN HELENA AND IMPROVE RESPONSE TIME.
5.1.5 Problem Diagno	2,200	ORIGINAL PROPOSAL EVALUATION: 2,200 POINTS AWARDED FOR THIS SECTION BFO: RESTATES PROPOSAL RESPONSE. DOES NOT MENTION WHERE ENGINEERING EXPERTISE IS OBTAINED. STATE'S EXPERIENCE SHOWS THAT NONE IS SOUGHT UNLESS ISD REQUESTS ACTION OR AGENCY COMPLAINS.

+500

← Total does not add up to 250.

EXHIBIT 12
DATE 2-4-97
HB 139

Plain language, Title 30, chapter 14, part

Attorney General authorized to purchase ease equipment and facilities for teletype-ter communications system, 44-2-302, 2-312 through 44-2-316.
Gifts to public servants having discretion-function in contract letting, 45-7-104.
False claims to public agencies, 45-7-210.
Contract authority — Highway Commis-n, 60-2-111.
Department of Transportation — aeronau-l powers — facilities, 67-2-101, 67-2-403.
Contract authority — municipal and re-nal airport authorities, 67-11-103.
Administration of state lands, Title 77.
Contract authority — Department of Agri-ure, 80-2-104, 80-7-504.

neral Matters

Handicapped persons' public employment ference, Title 39, ch.30.
Freedom from discrimination in public con-cts, 49-3-207.

context requires otherwise, in this of administration provided for in

rwise, in this part the following

t, materials, commodities, and spe-

ured or produced in this state and

of which 50% or more were manu-

0% or more are bona fide residents

lder whose residence is not in this

ment, commission, council, board, government corporation, or other

branch of this state and its political subdivisions, including the board of regents and the Montana university system.

(e) "Resident bidder" means a bidder whose residence is in this state as determined under 18-1-103.

History: En. 82-1901.1 by Sec. 57, Ch. 326, L. 1974; R.C.M. 1947, 82-1901.1; amd. Sec. 1, Ch. 512, L. 1987.

18-1-102. State contracts to lowest bidder. (1) (a) In order to provide for an orderly administration of the business of the state of Montana in awarding public contracts for the purchase of goods and for construction, repair, and public works of all kinds, a public agency shall award:

(i) a public contract for construction, repair, or public works to the lowest responsible bidder without regard to residency. However, a resident bidder must be allowed a preference on a contract against the bid of any nonresident bidder from any state or country that enforces a preference for resident bidders. The preference given to resident bidders of this state must be equal to the preference given in the other state or country.

(ii) a public contract for the purchase of goods, if the goods are comparable in quality and performance, to the lowest responsible resident bidder whose:

(A) bid is not more than 3% higher than that of the lowest responsible nonresident bidder;

(B) offered goods are Montana-made and whose bid is not more than 5% higher than that of the lowest responsible nonresident bidder; or

(C) offered goods are Montana-made and whose bid is not more than 3% higher than that of the lowest responsible resident bidder whose offered goods are not Montana-made.

(b) (i) If both subsections (1)(a)(ii)(B) and (1)(a)(ii)(C) are applicable to bids for a contract, the contract must be awarded to the resident bidder whose offered goods are Montana-made if the bid is:

(A) not more than 3% higher than that of a resident bidder whose offered goods are not Montana-made; and

(B) not more than 5% higher than that of the nonresident bidder.

(ii) However, no combination of preferences under this subsection may exceed 5%.

(2) The preferences in this section apply:

(a) whether the law requires advertisement for bids or does not require advertisement for bids; and

(b) to contracts involving funds obtained from the federal government unless expressly prohibited by the laws of the United States or regulations adopted pursuant thereto.

History: En. Sec. 1, Ch. 183, L. 1961; amd. Sec. 1, Ch. 197, L. 1969; R.C.M. 1947, 82-1924; amd. Sec. 1, Ch. 468, L. 1985; amd. Sec. 2, Ch. 512, L. 1987; amd. Sec. 1, Ch. 32, L. 1991.

Cross-References

Competitive bids for county road contracts, 7-14-2404.
Contracts for bridges, 7-14-2406.
Award of contract by local improvement district, 7-14-2716.
Economic development bonds — prefer-
Montana in-state investment — preference to Montana labor, 17-6-325.
Interest assessed on amounts overdue, 17-8-242.
Preference of Montana labor in public works — wages — federal exception, 18-2-403.
Small business set-asides, 18-5-304.

HOUSE OF REPRESENTATIVES
55TH LEGISLATIVE SESSION - 1997

ROLL CALL
APPROPRIATIONS COMMITTEE

DATE 2-4-97

NAME	PRESENT	ABSENT	EXCUSED
Rep. Tom Zook, Chairman	✓		
Rep. Ed Grady, Vice Chairman, Majority	✓		
Rep. Joe Quilici, Vice Chairman, Minority	✓		
Rep. Beverly Barnhart	✓		
Rep. Ernest Bergsagel	✓		
Rep. John Cobb			✓
Rep. Roger DeBruycker	✓		
Rep. Gary Feland	✓		
Rep. Don Holland	✓		
Rep. John Johnson	✓		
Rep. Royal Johnson	✓		
Rep. Betty Lou Kasten	✓		
Rep. Bob Keenan	✓		
Rep. Matt McCann			✓
Rep. Red Menahan	✓		
Rep. Ray Peck	✓		
Rep. Steve Vick	✓		
Rep. Bill Wiseman	✓		

APPROPRIATIONS COMMITTEE
HOUSE OF REPRESENTATIVES

DATE 2-4-97 BILL NOS. HB 139

PLEASE PRINT

NAME	ADDRESS	BILL NO.	PROPONENT	OPPONENT
Thane Johnson	Cut Bank MT	HB139		X
Scott Johnson	Bozeman MT	HB139		X
Mike Hitchcock	MT Beam + Brush Co - Butte	HB139		X
William F DeWolf	Butte Produce Co - Butte	HB139		X
Bill Grannan	Helena	HB139	X	
RILEY JOHNSON	NFIB	HB139		X
KAL SMILE	HELENA	HB139	X	
Sharon Gorie	Helena	HB139	X	
Barbara Larsen	Missoula	HB139	X	
Jeff Brandt	Helena	HB139		
W James Kembel	City of Billings	HB139	X	
Neil E. Johnson	Cut Bank	HB139		X
Carl Schweitz	MT Cont Ass'n	HB139		X
Sheryl Motl	Helena		✓	
MARYN Eicholtz	Helena		✓	
Tony Herbert	DD/DOA		✓	
LOIS MENZIES	DEPT. OF ADMIN.		X	
David Owens	MT Chamber of Commerce	HB139		✓
Laurence Hubbard	State Fund	HB139	X	
Craig Roloff	MSU	HB139	X	

PLEASE LEAVE PREPARED TESTIMONY WITH COMMITTEE SECRETARY.

visitreg.mp

Vote: Motion that HB 354 Do Pass As Amended carried 11 - 7 on a roll call vote, with REPS. BARNHART, DEBRUYCKER, JOHN JOHNSON, ROYAL JOHNSON, MENAHAN, PECK and VICK voting no.
{Tape: 1; Side: A; Approx. Tape Counter: 27.6.}

EXECUTIVE ACTION ON HB 139

Motion: REP. ROYAL JOHNSON moved HB 139 Amendment dated February 11, 1997, 7 pages, Do Pass. There were five bullets of amendments included in this motion. REP. JOHNSON also submitted an explanation of the bill with the amendments included.
EXHIBITS 2, 3.
{Tape: 1; Side: A; Approx. Tape Counter: 28.2.}

Discussion:
Marvin Eicholtz, Administrator, Procurement and Printing Division, Department of Administration, explained the amendments. Discussion continued on Tape 1, Side B.
{Tape: 1; Side: A; Approx. Tape Counter: 32.8.}

Substitute Motion/Vote: REP. KASTEN moved to separate the five amendments and vote on the first amendment, procurement preference, separately. Motion failed 6 - 12 on a roll call vote, with REPS. BERGSAGEL, KASTEN, MCCANN, PECK, VICK and WISEMAN voting yes.
{Tape: 1; Side: B; Approx. Tape Counter: 9.8.}

Motion/Vote: REP. ROYAL JOHNSON moved HB 139 Amendment Do Pass. Motion carried unanimously on a roll call vote.
{Tape: 1; Side: B; Approx. Tape Counter: 18.1.}

Substitute Motion/Vote: REP. MCCANN made a substitute motion to remove statutory appropriations from the bill. Motion carried 11 - 7, with REPS. KASTEN, BARNHART, GRADY, QUILICI, DEBRUYCKER, HOLLAND and WISEMAN voting no.
{Tape: 1; Side: B; Approx. Tape Counter: 18.2.}

Motion/Vote: REP. ROYAL JOHNSON moved HB 139 Do Pass As Amended. Motion carried 14 - 4 on a roll call vote, with REPS. DEBRUYCKER, FELAND, WISEMAN and CHAIRMAN ZOOK voting no.
{Tape: 1; Side: B; Approx. Tape Counter: 24.1.}

EXECUTIVE ACTION ON HB 235

Motion/Vote: REP. MENAHAN moved to Table HB 235. Motion carried unanimously.
{Tape: 1; Side: B; Approx. Tape Counter: 32.2.}

EXHIBIT 2
DATE 2-14-97
HB 139

DEPARTMENT OF ADMINISTRATION
PROCUREMENT & PRINTING DIVISION

MARC RACICOT, GOVERNOR

PO BOX 200132

STATE OF MONTANA

(406) 444-3053 FAX (406) 443-2212
(406) 444-2575

HELENA, MONTANA 59620-0132

February 11, 1997

TO: Chairman Zook
Members of the House Appropriations Committee

FROM: Marvin Eicholtz, Administrator
Procurement and Printing Division
Department of Administration

RE: Amendments to HB 139 concerning procurement reform

Attached is a series of potential amendments to HB 139 concerning procurement reform.

- The amendment concerning **procurement preferences** would return the procurement law to the status quo.

- The amendment to the **retroactivity** section is drafted to permit the ISC Distributors, Inc. v. Trevor case to continue district court. All other complaints filed after January 1, 1992 would be subject to the rewritten section of law concerning remedies for disappointed bidders, returning the law to its interpretation prior to the Supreme Court decision.

- The amendment concerning **contract time limits** returns procurement law to the status quo.

- The amendments to **"direct negotiation"** and "partnering" do three things. First, the amendments clarify that these methods of procurement could only be used to procure *information technology*. Second, a two-year *sunset provision* is attached to this section of law. Third, the department would be required to report to the *Legislative Finance Committee* any activity resulting from "direct negotiation" or "partnering."

- Amendments concerning the terms **"fair and equitable"** and "quality and integrity" return these phrases to the purpose section of the Montana Procurement Act. These terms were removed on the advice of our legal counsel to limit the number of words subject to judicial interpretation as was evidenced in the Supreme Court's rendering of its opinion in the ISC Distributors, Inc. v. Trevor case. Legal counsel believes that the statute and

procurement process speaks for itself and that fairness, equitableness, quality and integrity are inherent in the process already.

I hope that these amendments will satisfy the concerns of the committee. I would welcome the opportunity to be present at executive action on this bill to answer any questions which might arise.

Amendment to leave existing procurement preferences in place

1.Page 2, lines 18 through 24
Strike: Section 1
Renumber: subsequent sections

2. Page 2, line 26 through page 3, line 11
Strike: Section 2
Renumber: subsequent sections

3. Page 3, lines 13 through 19
Strike: Section 3
Renumber: subsequent sections

4. Page 4, lines 22 through 25
Following: Definitions.
Strike: ~~(1)~~ Unless the context requires otherwise, in this title, ~~"department"~~ the following definitions apply: (1) "Department"
Insert: Unless the context requires otherwise, in this title, the "department" means the department of administration provided for in Title 2, chapter 15, part 10.
Renumber: subsequent sections to original numbering

5. Page 4, line 26 through page 5, line 5
Strike: (2) ~~Unless the context requires otherwise, in this part the following definitions apply:~~
~~(a) "Goods" means supplies, equipment, materials, commodities, and specially manufactured products.~~
~~(b) "Montana made" means manufactured or produced in this state and made with the:~~
~~(i) use of parts, materials, or supplies of which 50% or more were manufactured or produced in this state; or~~
~~(ii) employment of persons of whom 50% or more are bona fide residents of Montana as defined in 18-2-401.~~
~~(c) "Nonresident bidder" means a bidder whose residence is not in this state as determined under 18-1-103.~~
~~(d)~~
Insert: (2) Unless the context requires otherwise, in this part the following definitions apply:
(a) "Goods" means supplies, equipment, materials, commodities, and specially manufactured products.
(b) "Montana made" means manufactured or produced in this state and made with the:
(i) use of parts, materials, or supplies of which 50% or more were manufactured or produced in this state; or
(ii) employment of persons of whom 50% or more are bona fide residents of Montana as defined in 18-2-401.
(c) "Nonresident bidder" means a bidder whose residence is not in this state as determined under 18-1-103.
(d)

6. Page 5, line 10 through 11
Strike: ~~(c) "Resident bidder" means a bidder whose residence is in this state as determined under 18-1-103.~~
Insert: (c) "Resident bidder" means a bidder whose residence is in this state as determined under 18-1-103.

7. Page 16, line 13
Strike: ~~, including the preferences established by Title 18, chapter 1, part 1.~~
Insert: , including the preferences established by Title 18, chapter 1, part 1.

8. Page 20 line 28 through page 21 line 2
Strike: Section 25
Renumber: subsequent sections

9. Page 21, lines 18 through page 22 line 9
Strike: Section 27
Renumber: subsequent sections

10. Page 22, lines 11 through 15
Strike: Section 28
Renumber: subsequent sections

11. Page 24, lines 28 through 29
Following: rules.
Strike: ~~However, except when prohibited by federal law, the commission shall make awards and contracts in accordance with 18-1-102 and 18-1-112.~~
Insert: However, except when prohibited by federal law, the commission shall make awards and contracts in accordance with 18-1-102 and 18-1-112.

12. Page 25, line 10
Strike: 18-1-102, 18-1-103, 18-1-106, 18-1-111,
Page 25, line 11
Strike: 18-1-112, 18-1-113, 18-1-114, 18-7-107

Amendment to change date of retroactivity to permit the ISC Distributors, Inc. v. Trevor to proceed

1. Page 2, line 13
Following: retroactively,
Strike: even to the parties in the ISC case, unless a final judgement is obtained in that case before [the effective date of this act], as provided in [section 36].
Insert: unless a complaint was filed in district court prior to January 1, 1992, as provided in [section -- (old 36)].

2. Page 25, line 22
Following:[section 15],
Strike: unless a final judgement awarding damages has been rendered regarding that claim, cause of action, or request for relief prior to the [effective date of this act].
Insert: unless a complaint was filed in district court prior to January 1, 1992, as provided in [section (old 36)].

3. Page 25, lines 19, 22, and 27
Renumber: listed sections

Amendment to re-establish contract time limits

1. Page 19, line 28 through page 20 line 17
Strike: Section 23
Renumber: subsequent sections

2. Page 22, line 30 through page 24, line 17
Strike: Section 30
Renumber: subsequent sections

3. Page 24, line 19 through 22.
Strike: Section 31
Renumber: subsequent sections

Amendment concerning "direct negotiation" and "partnering"

1. Page 14, line 30 through page 15, line 4
Following: (4)
Strike: A contract for supplies or services, or both, may be negotiated, in accordance with department rules and with the approval of the department director, directly with a vendor without using competitive sealed bidding or a competitive sealed proposal. A contract may be awarded pursuant to this section only when it is advantageous to the state to use direct negotiation in the procurement of new or unique requirements of the state, in the procurement of new technologies, or to achieve best net value.
Insert: A contract for information technology systems and services may be negotiated directly with a vendor without using competitive sealed bidding or competitive sealed proposals in accordance with department rules and with the approval of the department director. The department must report any activity using this method of procurement to the legislative finance committee.

2. Page 15, lines 6 through 8
Following: administer
Strike: a
Insert: an information technology
Following: or other
Insert: information technology
Following: business entities
Strike: if the department determines the contract or relationship to be in the best interests of the state.
Insert: in accordance with department rules and with the approval of the department director. The department must report any activity using this method of procurement to the legislative finance committee.

3. Page 15, following line 8.
Insert: NEW SECTION. Section __. Termination. Sections 18-4-302 (4) and (5) terminate on October 1, 1999.

Amendment relating to "fair and equitable," etc.

1. Page 5, line 23 through 24
Strike: ~~ensure the fair and equitable treatment of all persons who deal with the procurement system of the state~~ provide the exclusive remedies for unlawful bid solicitations or contract awards;
Insert: ensure the fair and equitable treatment of all persons who deal with the procurement system of the state;

2. Page 5, line 26
Following: state;
Strike: and

3. Page 5, line 27
Following: system
Strike: ~~; and~~

4. Page 5, line 28
Strike: ~~(8) provide safeguards for the maintenance of a procurement system of quality and integrity."~~
Insert: (8) provide safeguards for the maintenance of a procurement system of quality and integrity; and
(9) provide the exclusive remedies for unlawful bid solicitations or contract awards."

5. Page 11, line 18 through 22
Strike: Section 13
Renumber: subsequent sections

6. Page 25, line 11
Strike: 18-4-234

Amendment to the title if all amendments are adopted:

Title, page 1, line 6 and 7
Strike: ELIMINATING PREFERENCES IN THE PROCUREMENT PROCESS;

Page 1, line 12
Strike: 7-14-2404, 7-14-2406, 7-14-2716

Page 1, line 13
Strike: 18-4-231

Page 1, line 14
Strike: 18-4-313, 18-5-308

Page 1 line, 15
Strike: 18-7-104, 18-7-105, 53-1-203, 53-30-505

Page 1, line 16
Strike: 18-1-102, 18-1-103, 18-1-106, 18-1-111, 18-1-112, 18-1-113, 18-1-114, 18-4-234,

Page 1, line 17
Strike: 18-7-107,

Page 1, line 18
Following: EFFECTIVE DATES
Strike: AND
Insert: ,
Following: A RETROACTIVE APPLICABILITY DATE
Insert: AND A TERMINATION DATE

Internal bill references to be changed when renumbering is complete:

1. Page 2, line 9

2. Page 2, line 12

3. Page 2, line 14

4. Page 15, following line 8. Adjust section number in termination section.

5. Page 25, line 19

6. Page 25, line 22

7. Page 25, line 27

Exhibit # 3 - 25 pages

The full exhibit is available from:
MT Historical Society Archives
225 North Roberts
P. O. Box 201201
Helena, MT 59602-1201
Phone: (406) 444-4775

EXHIBIT 3
DATE 2-14-97 C0319.01
HB 139 out of bill
back in bill

BILL NO. _____

re: A - refuses to specify amendment

DEPARTMENT OF ADMINISTRATION

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE LAW RELATING TO PUBLIC CONTRACTS; AMENDING MONTANA PROCUREMENT LAWS; ELIMINATING PREFERENCES IN THE PROCUREMENT PROCESS; MODERNIZING STATE PROCUREMENT PROCEDURE BY PROVIDING OPTIONS FOR SOURCE SELECTION, CLARIFYING TERMS AND PROCEDURES, AND STREAMLINING THE STATE PROCUREMENT PROCESS; STATUTORILY APPROPRIATING THE PROCEEDS OF SALES OF PROPERTY; PROVIDING EXCLUSIVE REMEDIES FOR UNLAWFUL SOLICITATIONS OR AWARDS; PROVIDING FOR THE PROCUREMENT OF CONSULTING SERVICES IN THE SAME MANNER AS OTHER SERVICES ARE PROCURED; AMENDING SECTIONS 7-14-2404, 7-14-2406, 7-14-2716, 17-7-502, 18-1-101, 18-4-122, 18-4-123, 18-4-126, 18-4-132, 18-4-133, 18-4-141, 18-4-224, 18-4-231, 18-4-241, 18-4-242, 18-4-302, 18-4-303, 18-4-304, 18-4-305, 18-4-309, 18-4-310, 18-4-312, 18-4-313, 18-4-402, 18-5-308, 18-6-101, 18-7-104, 18-7-105, 18-8-211, 53-1-203, 53-30-505, AND 60-2-112, MCA; REPEALING SECTIONS 18-1-102, 18-1-103, 18-1-106, 18-1-111, 18-1-112, 18-1-113, 18-1-114, 18-4-131, 18-4-225, 18-4-234, 18-7-107, 18-8-101, 18-8-102, 18-8-103, 18-8-104, 18-8-105, 18-8-106, 18-8-111, AND 18-8-112, MCA; AND PROVIDING EFFECTIVE DATES AND A RETROACTIVE APPLICABILITY DATE."

WHEREAS, the Montana Supreme Court held in ISC Distributors, Inc. v. Trevor, 273 M 185, 903 P2d 170 (1995), that an unsuccessful bidder on a state contract may sue the state for money damages under Title 18, chapter 4, MCA, commonly known as the Montana Procurement Act; and

WHEREAS, a judgment for damages in a state contract suit brought pursuant to the Montana Procurement Act makes Montana taxpayers pay twice for the same product; and

WHEREAS, in enacting the Montana Procurement Act, the Legislature did not intend to allow disappointed bidders on state contracts to be awarded damages under the Montana Procurement Act, but rather intended that the exclusive remedies of a disappointed bidder be the remedies provided in section 18-4-242, MCA, which do not include the award of money damages to an unsuccessful bidder; and

WHEREAS, the Montana Supreme Court held in Meech v. Hillhaven West, Inc., 238 M 21, 776 P2d 488 (1989), that no fundamental right to a particular cause of action or remedy exists under Montana law

HEARING ON HB 139

Sponsor: REP. EMILY SWANSON, HD 30, BOZEMAN

Proponents: Lois Menzies, Department of Administration
Marvin Eicholtz, Department of Administration
Bill Gianoulias, Department of Administration
Laurence Hubbard, State Fund
Rob Specter, MSU-Bozeman

Opponents: Bill Squires, Montana Telephone Association

Opening Statement by Sponsor:

REP. EMILY SWANSON, HD 30, BOZEMAN HB 139 has no appropriation in it. A revised fiscal note is handed out. **(EXHIBIT #2)** This bill is a rewrite of the Montana Procurement Act which was written in 1983. It is an effort to bring the department and the procurement process into the 1990's. Preferences were amended back into the bill in House Appropriations. I would like to give you a letter from **REP. BARDENOW** to myself. **(EXHIBIT #3)** This bill reaffirms the intent of the 1983 legislature when they created this act. Disappointed bidders should be allowed to go through an administrative process to be able to stop the bid if it was done badly and be able to redress their grievances by redoing the whole bid. They should not be allowed to sue the state for damages which is what is currently allowed. If we allow vendor's to sue the state for lost potential profits we are creating an incredible liability. HB 139 allows direct negotiations for computer purchases and some limited partnering in contracting.

{Tape: 1; Side: A; Approx. Time Count: 8:20; Comments: None.}

Proponents' Testimony:

Lois Menzies, Department of Administration (DOA) Testimony handed in. **(EXHIBIT #4)**

Marvin Eicholtz, DOA Testimony handed in. **(EXHIBIT #5)**

Bill Gianoulias, DOA Testimony handed in. **(EXHIBIT #6)**

Laurence Hubbard, State Fund We support HB 139.

Rob Specter, MSU-Bozeman The university sees HB 139 as an opportunity to get better prices, faster service and lower administrative costs in procurement. We support HB 139 and urge your support.

{Tape: 1; Side: A; Approx. Time Count: 8:30; Comments: None.}

Opponents' Testimony:

Bill Squires, Montana Telephone Association (MTA) MTA represents 11 independent telephone companies across the State of Montana. MTA and its members oppose two specific sections of HB 139, sub-sections 4 & 5 on page 15 of the bill. Section 4 would allow the DOA to contract for information technology systems and services without going through the competitive bid process. MTA and its members are in the information technology systems and services business. We believe the competitive bid process has served our industry and the state well. We have been involved in the competitive bid process for information technology services and believe the end product purchased by the state was better because of this competitive bid process. Section 5 allows the DOA to partner with private business for the purchase of information technology systems. We believe this provides an unfair and anti-competitive advantage to anyone who would partner with the state. We have been told the primary concern of the DOA is the purchasing of software, if these sections were limited to software procurement we would support them. We ask the committee to strike sub-sections 4 & 5 of section 11.

{Tape: 1; Side: A; Approx. Time Count: 8:34; Comments: None.}

Questions From Committee Members and Responses:

SEN. CHRIS CHRISTIAENS Could you talk a little about the potential lawsuit on the mental health contract? **Mr. Gianoulias** I'm not sure what you are asking. If we don't pass this, can a lawsuit be filed, yes. If the law stays as it is the unsuccessful bidders could sue and if they can show that there was negligence or bad faith in the bid letting process, they could seek to recover damages. I believe the measure of those damages would be the lost profits on the contract.

SEN. TOM BECK Please explain Section 11, page 15. **REP. SWANSON** The DOA is proposing to be able to go to a computer company and ask for help solving a problem, the RFP process has them using "square corners" and having bidders fit preestablished criteria that the department may not have known when buying something as fast moving as computer technology. The idea is to give them greater flexibility in buying computer technology. The House amendments set this up on a two year trial basis with the department reporting to the Legislative Finance Committee when they do a contract of this type.

SEN. DARYL TOEWS Why should we go back and get the state out of a bind on a past contract? It seems there was good reason in that the state was negligent in how they handled that particular situation. **Mr. Gianoulias** ISC will be allowed to go forward with their case, we are not getting off the hook for what happened with ISC. The legislative auditors report that was done in August 1991 shows that there was no wrong doing found along the lines you may have heard about or may be suggesting. ISC

could have sought recision if it is a bad contract. Good policy would be to get rid of the bad contract and not have taxpayers have to pay twice. The recision process will discover if there is wrong doing.

SEN. MIKE TAYLOR How long does the bidding process currently take? **Mr. Eicholtz** It depends on the complexity of the contract. Generally, it takes less than 30 days but can take longer on complex technology contracts.

SEN. TAYLOR The statement was made that states spend 5 cents on procurement and the private sector spends approximately 1 cent per dollar. Who would like to stand up and say we will save 4 cents on the dollar if this bill is passed? **Mr. Eicholtz** That information is from a study in Texas, not Montana. The process can be speeded up and eventually we may have some efficiencies. In my opinion, reforming the procurement process will save us time and money down the road.

{Tape: 1; Side: A; Approx. Time Count: 8:43; Comments: None.}

SEN. TAYLOR Can you give me an example of a long process? **Tony Herbert, DOA** I could give you several examples but will give you two. The SummitNet RFP was for the data network that covers the entire state. That bid process began on May 19, 1995 and we signed a contract in January 1996. In the area of information technology it takes a great deal of time to figure what we need to do and write it down in the right form. We are currently working on an RFP process for a new E-Mail software package for approximately 8,000 terminals in the state. We have been involved in the assessment of that environment for the last year with approximately 30 state employees in different departments. We issued an RFP in December which will probably come to closure in May. This is a dual RFP process in which we are determining companies to tell us which products we should look for and then determining the company that distributes those products. The complications continue because the business of technology is more complicated.

SEN. TAYLOR If this bill were to pass, what do you think the net effect will be? **Mr. Herbert** The key item in subsections 4 & 5 on page 11 is that it gives us a two year opportunity to look at doing some of these things in a different way. We may be able to come back to you after two years with suggestions on better ways to handle this type of procurement that may save the money you've been hearing about today.

SEN. MOHL Why are the second bidders suing? **Mr. Eicholtz** I believe that, since our contracts are getting bigger, losers are coming in to challenge us on the "square corners" we may have rounded. If they can sue the state for monetary damages on a large contract, they will. This doesn't happen in the private sector or most other jurisdictions in the country. We need to be

in the situation where the remedy for the disappointed bidder is to go through a process if the bid is bad.

SEN. MOHL What contracts are covered by this? **Mr. Eicholtz** This would be on all contracts that we bid. Bidders have to meet certain criteria and we usually go with the low bidder.

SEN. MOHL Is there a limit to what you can negotiate? How about reimbursing the person who has money invested in the bidding process? **Mr. Eicholtz** We don't throw people out because we don't like their bid. We select the vendors and the bidders based upon criteria evaluated on each bid. It is scored on a point basis by a variety of people and the vendor with the highest score is the winner. The next bidder can then challenge us on our scoring methodology.

SEN. LOREN JENKINS In testimony it was stated that if HB 139 didn't pass we would be sued and if it did pass we wouldn't be sued. How can we change a contractual agreement? **Mr. Eicholtz** If we pass this bill as it is written today it will allow ISC to proceed in district court to sue us for monetary damages on a bid situation. The retroactivity date means if they haven't filed a lawsuit by that date, they won't be able to sue us for monetary damages. That doesn't prevent them from going through the process to cancel or protest the bid.

SEN. JENKINS Are there any cases filed since 1992 that this would cover? **Mr. Eicholtz** I believe there is one case dealing with the Department of Commerce, Travel Montana and a California company.

SEN. LYNCH You mentioned rounding these "square corners," when you do that are you knowingly violating the law? **Mr. Eicholtz** Some requirements are more important than others in these large contracts. For example, they may have to have documentation provided with their product at the time of the bid and they may not have gotten it in, we may give them 24 hours to get it to us. Or going over a page limit.

SEN. LYNCH I believe we should have some flexibility for you to do that rounding without breaking the law and being sued. If I'm A company, did everything right and I see you rounding these corners, it would look to me like you're going to make sure B company gets it no matter what I do. **Mr. Eicholtz** That is what the process is all about. That vendor can protest the bid through our process procedure or a contested case hearing.

SEN. LYNCH If you've made the exceptions for company B and you are the one writing the protest procedure it seems you'd say everything is okay. **Mr. Eicholtz** The protest procedure with us is only at the beginning and if that doesn't work they go to a contested case hearing where a hearings officer is appointed. That is outside our jurisdiction. If they are still not satisfied they can request judicial revenue.

SEN. BECK I received a letter from a company that was written out of the contract for a copier because they couldn't meet the specs of the contract. Do you have many problems with restrictive specifications? **Mr. Eicholtz** Yes, we do. Vendors frequently try to do business with an agency and develop specifications. Our job is to try and recognize them and make the RFP a broad based bid that all parties can bid on. Sometimes there are specific reasons for that product to be restricted.

SEN. BECK In section 6 of the bill, vegetables and fresh fruit are taken out. Why was that in the original procurement bill and taken out now? **Mr. Eicholtz** I don't know why it was in the original bill, it is at a dollar limit that is delegated to agencies. This is a clean-up item.

{Tape: 1; Side: B; Approx. Time Count: 8:58; Comments: None.}

SEN. KEATING Are we allowing just one bureau to have the freedom to negotiate or does this bill allow greater latitude for negotiating in other departments as well? **Ms. Menzies** The procurement environment is fairly decentralized, we have a small staff within the DOA that does oversight functions and assists on large procurements. For the most part agencies have the flexibility to purchase small dollar items without intervention by the department. In the case of direct negotiations, agencies would have to ask us whether it would be appropriate to do it. Ultimately, I would have to give approval for that.

SEN. KEATING This bill allows information technology to negotiation directly for high tech material but with a two year sunset. **Ms. Menzies** This is an effort to get one more tool to allow us to get our work done. To increase the comfort level in the House we said we would report to the finance committee in the interim if they would let us test it for two years. If you consider what we did to be irresponsible then this will sunset and we'll admit it was a bad idea.

SEN. KEATING To what extent does the director have oversight on what the bureau's are doing? **Ms. Menzies** We do not have a highly significant oversight function on smaller purchases. We get involved on large purchases and attempt to make the RFP's as open as possible. We think it makes better sense to use our resources on large procurements.

SEN. KEATING I'm speaking specifically in regard to the information technology systems, to what extent would you have overview on the negotiations? **Ms. Menzies** There are two avenues of participation, by statute and the general procurement laws. I rely heavily on my administrators to advise me in these areas. Agencies go through ISD and procurement for approval, under this law they would also need the approval of the director before they could directly negotiate.

SEN. KEATING HB 139 repeals a section of law dealing with consultants and the good faith statute. Why is that being repealed? **Ms. Menzies** We currently have two parallel systems, one for consultants and one for everything else. We are suggesting it makes more sense to merge those and have a single process. That is why we are repealing the consultant law. **Mr. Gianoulias** Page 6, section 2 deals with the good faith area. This language makes the other language repetitive, it is not exactly the same language but similar. Part of the reason we took 18-4-131 out is because that is what the Supreme Court decided the ISC case on.

SEN. MIGNON WATERMAN Regarding the rounding corners question, I was involved in the managemental health contract, I believe we put in a requirement of 100 pages. According to what I've read in the papers there was a 144 pages in the winning bid. If we are going to put those requirements in, we need to live by them or we shouldn't put them in. **Mr. Eicholtz** You are correct in that the bid is being protested and is going through the process now. The page count may seem like a big discrepancy and it may end up being one. Normally we are talking about small things where we may have put in "must" and it should be "should".

SEN. WATERMAN I would like some assurance that we are talking about the same small rounding and that if we give you this flexibility you will exercise some responsibility to see that we won't end up in a challenge situation. **Mr. Eicholtz** I believe that is what the recision process is for. Direct negotiation has to be approved by the director. We will write administrative rules regarding when this process can be used for large information technology systems.

SEN. TOEWS What has been the future success rate on vendors who have gone through the appeal process? Are they outside the system after a protest? **Mr. Eicholtz** Are you saying that because they protest we would not do business with them? We would never do that.

CHAIRMAN SWYSGOOD Why would the department not put a project of this magnitude out for bid? Why is it necessary to change from the current bid process? **Ms. Menzies** It is our suggestion that we use direct negotiations on a limited basis to procure complicated information technology systems. I am currently involved in a process to develop an RFP in anticipation of purchasing management information systems for the state because of year 2000 problems, roughly $16 million. We don't know exactly what we want or need for the State of Montana. It has been many years since we have dropped a large computer system into place. We plan to use the RFP process for this but don't know what specifications to ask for, what the market is like, or what the technology is about. Suppose we decide we need this, this and this and get into the process to find out we are evaluating the wrong things.

CHAIRMAN SWYSGOOD I have a real problem with this part of the bill and you have just solidified that concern for me. If you don't know what to put in an RFP, how will you know who to go to in the technology field to get the information without having more than one firm in the process? **Mr. Specter** Frequently, there is more than one solution to an information technology problem. We seek the lowest cost and best solution. We don't always know the best way to get to the solution so we talk with service providers who can help us think the issues through. The RFP process adds from 6-12 months to this process.

CHAIRMAN SWYSGOOD I can't believe a technology firm won't say their product is the best. You may be getting only one or two suggestions and you are not doing the taxpayers justice by not allowing everyone with these capabilities to bid in an RFP process. **Mr. Specter** Adding 12 months of frustration and difficulty to an complex process does not serve the state either.

{Tape: 1; Side: B; Approx. Time Count: 9:20; Comments: None.}

Closing by Sponsor:

REP. SWANSON Direct negotiation will give the state the possibility of knowing if a vendor can provide the service, understand the problems and answer the questions. I think direct negotiation is a great idea and hope you will give the department two years to give it a try and report back to us. Remember that the taxpayers of Montana pay the bill when a vendor sues the state for damages. We should allow vendors a way to stop the process but not allow them to sue the state for lost damages. It is difficult for government to find ways to be more efficient and run more like a business. I believe this bill is a good step in the right direction by giving the department some tools to be more business like, save money and be more efficient.

{Tape: 2; Side: A; Approx. Time Count: 9:25; Comments: None.}

HEARING ON SB 374

Sponsor: **SEN. DON HARGROVE, SD 16, BOZEMAN**

Proponents: **Mary Ann Wellbank, Department of Public Health and Human Services**
John Larson, Missoula District Judge

Opponents: None

Opening Statement by Sponsor:

SEN. DON HARGROVE, SD 16, BOZEMAN SB 374 has had a hearing in the Senate Judiciary Committee and is directly required by the personal responsibility and work opportunity reconciliation act otherwise known as the federal welfare reform act. Upon it rides

our federal child support and welfare money. This is to get tough on deadbeat dads and there are many unpleasant things in it. There are items directly related to the Families Achieving Independence in Montana (FAIM) program that was passed by the 1995 legislature.

{Tape: 2; Side: A; Approx. Time Count: 9:31; Comments: None.}

Proponents' Testimony:

Mary Ann Wellbank, Department of Public Health and Human Services (DPHHS) **Ms. Wellbank** gives an overview of the bill and **(EXHIBIT #7)** There is some clean-up language in the bill that is not federally driven. The blue book **(EXHIBIT #8)** is a summary of federal information. DPHHS is interested in working with you on this so it works for Montana.

John Larson, Missoula District Judge I am in support of the bill but have several concerns and would like to work with the subcommittee to clarify how we work. This bill impacts all our cases in child support, abuse and neglect, juvenile and many other cases we deal with. We would like to lessen confrontations with the Child Support Enforcement Division.

Opponents' Testimony: None

{Tape: 2; Side: A; Approx. Time Count: 9:43; Comments: None.}

Questions From Committee Members and Responses:

SEN. KEATING Is there anything in SB 374 that is not mandated? **Ms. Wellbank** Yes.

SEN. EVE FRANKLIN Do we have the flexibility to pick and choose what we want in this bill? **Ms. Wellbank** I don't feel we have any flexibility at all.

{Tape: 2; Side: A; Approx. Time Count: 9:46; Comments: None.}

Closing by Sponsor:

SEN. HARGROVE closes.

CHAIRMAN SWYSGOOD Members of the subcommittee to work on this bill are: **SEN. KEATING, Chairman; SEN. BAER, SEN. WATERMAN, SEN. MAHLUM, SEN. JERGESON, SEN. HALLIGAN** and **SEN. HOLDEN.**

{Tape: 2; Side: A; Approx. Time Count: 9:49; Comments: None.}

EXECUTIVE ACTION ON HB 7

Motion/Vote: **SEN. LYNCH MOVES HB 7 BE CONCURRED IN. THE MOTION CARRIED UNANIMOUSLY.** **SEN. LYNCH** will carry HB 7.

SENATE FINANCE AND CLAIMS
EXHIBIT NO. 2
DATE 3/6/97
BILL NO. HB139

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0139, second reading

DESCRIPTION OF PROPOSED LEGISLATION:
An act to generally revise the Montana Procurement Act.

ASSUMPTIONS:

1. Cost savings due to procurement reform processes cannot be measured with any degree of certainty.
2. The bill, as amended, retains current law procurement preferences and does not provide for new statutory appropriations to agencies for the net proceeds from sales of surplus property. Therefore, there is no fiscal impact related to either of those items.

FISCAL IMPACT:
The fiscal impact, if any, cannot be measured with any degree of certainty.

Dave Lewis 3-5-97
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Emily Swanson 3-5-97
EMILY SWANSON, PRIMARY SPONSOR DATE

SENATE FINANCE AND CLAIMS
EXHIBIT NO. 3
DATE 3/6/97
BILL NO. HB139

Hon. Emily Swanson
Capitol Station
Helena, Mt. 59620

Dear Rep. Swanson:

I have been informed by the Dept. of Administration that you are sponsoring H.B. 139 which amends the Montana procurement section of the Montana Code. They have asked me to send my recollection of the original enactment of this law. I was on the state administration committee and it's sub-committee that approved H.B. 493 in 1983.

House Bill 493 was the model procurement act. It was legislation that standardized the purchasing process throughout the United States. Model legislation is carefully designed to meet problems in various areas of government.

Montana at that time did not have clear guidelines on resolution of disputes in the bidding process. One of the purposes of H.B. 493 was to permit loosing bidders that felt there had been unfairness in awarding bids to negotiate with the bidding agency to cancel the bid award and rebid.

If the bidding agency refused they could ask a district judge for relief. If the judge felt the process had been unfair he (she) could order the award bid cancelled and the state should have a re-bid of the disputed bid award.

There never was any consideration given to awarding monetary damages. I do not like to criticize court decisions but feel this action is a serious example of judicial legislating. The legislature has not amended this legislation to award monetary damages. If the legislature desires to award financial damages it should do so in legislation enacted by the legislature.

Under the court decision suits could be fought for years through the court system in the hope of securing large awards. The state of Montana can ill afford these long drawn out and costly legal battles. H.B. 139 will return the law to its original intent. The procurement act as now - no longer model legislation as Montana is the only state that awards damages. I fear the possible costs of the legal suit filed recently against the $400,000,000 mental health contract award. I would appreciate it if you would give Rep. Swanson's H.B. 139 careful consideration.

Sincerely,
Frances S

SENATE FINANCE AND CLAIMS
EXHIBIT NO. 4
DATE 3/6/97
BILL NO. HB139

TESTIMONY ON HOUSE BILL NO. 139

Senate Finance and Claims Committee
Submitted by Lois Menzies, Director,
Department of Administration
March 6, 1997

This session, the Department of Administration has several bills that represent redesign or reconstruction efforts. For instance, we have presented proposals to revamp our automated management information systems, to reform our employee pay system, and to continue restoring the capitol. This bill is consistent with our reform proposals. It is our attempt to reengineer the state's practices for buying products and services.

It seems as if we often ask government to be run more like a private business. We talk about the need to be more competitive and more efficient. One study in Texas compared the cost of procurement in the public sector with the private sector. It found that governments spend an average of five and one-half cents to process every dollar of procurement. In contrast, the private sector spends just one cent per dollar to do the same. HB 139 brings our procurement process more in line with private sector practices and with what's happening in the public sector throughout the nation.

This bill is particularly important in the area of information technology. State government is highly dependent on technology for the delivery of services to our customers. We have found that our current procurement laws do not allow us to keep pace with the rapid changes in technology. This bill will give us some important tools to take advantage of appropriate technological changes.

Since adoption of the Montana Procurement Act 14 years ago, there has not been much reform in the area of public procurement. The law simply has not kept current with significant changes that have occurred in government and the marketplace. It's now time for a tune-up. We believe the benefits of procurement reform are clear and compelling.

SENATE FINANCE AND CLAIMS
EXHIBIT NO. 5
DATE 3/6/97
BILL NO. HB139

Testimony in Support of HB 139 Generally Revising the Montana Procurement Act

Submitted by Marvin Eicholtz, Administrator
Procurement and Printing Division
to Senate Finance and Claims
March 6, 1997

Exactly 100 years ago, Montana adopted the first of a long series of laws which would guide how the government made its purchases. That law evolved with the times, with the last major change to public procurement law being made in 1983. I am here today to endorse the next major change to Montana's procurement law to streamline and modernize how the state will conduct its business as we head into the 21st century.

The need exists to modernize public procurement.

- The Montana Procurement Code was adopted in 1983. What the state buys is much different than 14 years ago, but how we buy it is still the same.
- Public procurement needs to include procurements which are outcome or *"best value"* focused, rather than on procurements which focus primarily on satisfying traditional *process* requirements.
- The Department has already made major advances in changing the shape of procurement. Vendors can now access bids and proposals for state work electronically via a web site on the Internet. In addition, we are in the final stages of completing a pilot project in which all state agencies will be able to make small purchases using a "Procurement card," much like the Mastercard we carry around for personal use. The impact of the procurement cards will be drastic reduction in the paperwork associated with making and processing these purchases.

The Department of Administration has proposed five legislative initiatives to streamline and modernize state procurement, without sacrificing the responsible expenditure of public funds.

Initiative #1 Increase methods of source selection. (Sections 11, 14, 18 & 24)

- Public procurement exists to add value to the procurement process for governmental agencies. The entire system of laws and rules are designed to obtain the best quality products at the lowest price. The following provisions will provide agencies with additional options for making procurements in situations where traditional procurement methods cannot effectively meet the demands of complex and fast-changing supplies and services.

- Upon approval of the director and in accordance with administrative rules, permit some contracts for information technology to be *negotiated directly* with a vendor. Expected to only be used on a very limited basis for new or unique requirements for the state, new technologies, or to achieve the best net value for the state. This procurement option will be used only on a trial basis and is scheduled to sunset on October 1, 1999 unless the Legislature opts to make this a permanent procurement option. Any procurement activity using this method must be reported to the Legislative Finance Committee.

- Add language to permit the state to *"partner"* with a non-profit or business entity for some information technology contracts. Expected to be used in major undertakings where the sharing of the cost of the project with a private entity will clearly be in the best interest of the state. This process will be an exception to regular procurement activity and will be subject to the approval of the director and must adhere to administrative rules. This procurement option will be used only on a trial basis and is scheduled to sunset on October 1, 1999 unless the Legislature opts to make this a permanent procurement option. Any procurement activity using this method must be reported to the Legislative Finance Committee.

- Add *"limited solicitation"* as a second option for making some purchases in addition to current "small purchase" procedures. Rules will be developed by the department to permit purchases between $5,000 and $15,000 to be made with limited documented competition, without going through the normal sealed procedures currently required for all procurements over $5,000.

Initiative #2 Provide flexibility in the contracting process. (Sections 8 &16)

- Contracting for state supplies and services is becoming increasingly complex and specialized. State contract managers need the flexibility to draft contracts that can meet unique circumstances while still serving the best interest of the state.

- This bill will permit the state to enter into any type of contract that will promote the best interest of the state. Currently, the state cannot enter into cost-plus percentage of cost contracts and the use of a cost-reimbursement contract is restricted. Removing this restriction will permit purchasing officials to use these types of contracts if the procurement situation warrants it.

- This bill also clarifies that the state may accept a lower price or better value if offered by a contractor, regardless of contract provision. The state has been in the awkward position of not readily knowing if a lower price for a product could be accepted when it was offered by the contractor, for fear of violating the bidding process.

Initiative #3 Permit prequalification of suppliers. (Section 15)

- Permit prospective vendors to be prequalified to bid on a project. The department will draft rules guiding the prequalification process. Prequalification is a tool that can reduce the amount of time it takes to make complex procurements.

Initiative #4 Procure "consulting services" like a regular "service." (Sections 3,5 & 21)

- Change the definition of "service" within the Montana Procurement Act to include the procurement of "consultants." Currently consultants are procured through a parallel procurement process guided by Title 18, chapter 8. This amendment would repeal those sections of law and consultants would be procured like any other service in state government. *Note: the professions exempted from the existing consulting services act in 18-8-103 would be retained and still be exempted from all procurement procedures (doctors, expert witnesses, consulting actuaries, etc.). Pharmacists, all consulting actuaries, private investigators, and claims adjusters would be added to the list of professions exempted from the Montana Procurement Act.*

  The consulting services act was adopted in 1981 at time when there was no functional process for obtaining personal services. The Procurement Act was adopted in 1983, and in effect, set up a parallel process to the consulting services procurement process. The disparity and duplication of two parallel procurement systems has been frustrating ever since.

Initiative #5 Establish the exclusive remedies for violations of the procurement process. (Sections 2, 10, 21, 23 & 25)

- Return the remedies available to disappointed vendors to those intended when the Montana Procurement Act was adopted in 1983.

- The implications of this Supreme Court decision are very far-reaching. Nationwide, a suit for damages by an unsuccessful bidder is allowed in only a small handful of jurisdictions, and then only under very narrow circumstances.

- Allowing damage awards has generally been viewed as contrary to public policy because it would require that the taxpayers pay twice for the same goods and services -- we not only pay for the purchased item, but potentially provide a windfall to a disappointed vendor.

- This bill makes several clarifying statements to clearly set out the exclusive remedies for disappointed bidders and return the law to its former interpretation -- either the award can be declared void, or ratified and affirmed as it is.

- There is a retroactive clause attached to this bill which would affirm that there never was a legislative intent to permit monetary damages to unsuccessful bidders. This retroactivity will apply to all cases filed after January 1, 1992. This date will permit the ISC v. Trevor case to proceed to district court.

In Summary...

- The State of Montana purchases over *$100 million dollars worth of supplies and services each year from the private sector...* from pens to statewide telecommunications systems, and from hay bales to multi-year, multi-million dollar managed mental health care systems.

- Current procurement methods don't work for everything. We need procurement methods to keep pace with the changes going on around us, especially in the area of information technology.

- Our focus needs to be on results, not on process.

- In February of 1996, President Clinton signed a bill to completely overhaul federal procurement laws to make procurement faster and more efficient. Now state governments are responding to the need for change. Numerous state procurement offices are taking steps to re-engineer the procurement process, reducing the time it takes to procure items, streamlining the layers of review and oversight, allowing managers more discretion for small purchases, broadening relationships with vendors and awarding bids based on best value.

- We have developed a package of reforms that we believe will help move Montana's procurement procedures into the 21st century -- *without sacrificing the responsible expenditures of public funds.*

SENATE FINANCE AND CLAIMS
EXHIBIT NO. 6
DATE 3/6/97
BILL NO. HB139

DEPARTMENT OF ADMINISTRATION
RISK MANAGEMENT AND TORT DEFENSE DIVISION

MARC RACICOT, GOVERNOR

1500 EAST SIXTH—LOWER LEVEL
PO BOX 200124

STATE OF MONTANA

TELEPHONE (406) 444-2421
FAX (406) 444-2592

HELENA, MONTANA 59620-0124

March 6, 1997

TESTIMONY IN SUPPORT OF HB 139, by Bill Gianoulias, Chief Defense Counsel, Risk Management and Tort Defense Division, Department of Administration.

The retroactive provision of this bill may be applied if the intent of the legislature to do so is expressly declared. Boehm v. Alanon Club, 222 Mont. 373 (1986) and MCA § 1-2-109.

The Montana Supreme Court, in Harrison v. Chance, 244 Mont. 215 (1990) upheld MCA § 49-2-509(7) which made the Human Rights Act the exclusive remedy for sexual discrimination and dismissed plaintiff's tort claims. The tort claims had been recognized in Drinkwalter v. Shipton Supply, 225 Mont. 380 (1987).

In February 1987, the Court ruled in Drinkwalter that tort remedies, in addition to remedies under the Human Rights Act, existed for sexually discriminatory acts in the workplace. On April 16, 1987 § 49-2-509(7) was enacted making the Human Rights Act the exclusive remedy for discrimination. The legislature expressly provided that the exclusive remedy applied to cases not yet brought to final judgment. All acts Harrison complained of happened before April 16, 1987. Harrison filed her complaint in district court on September 28, 1987. The Court ruled that Harrison's tort claims were properly dismissed, applying the statute retroactively.

The Harrison case provides a close parallel which supports the retroactive provision of HB 139.

Affirming, by passing HB 139, that the legislature did not and does not allow an award of money damages to an unsuccessful bidder, is good policy. If the contract was awarded improperly, it is in the public interest to have it set aside. HB 139 (as did MCA § 18-4-242) provides for rescission of the contract.
This ensures that the contract will be awarded properly and that the public does not pay twice.

MONTANA SENATE
1997 LEGISLATURE
FINANCE AND CLAIMS COMMITTEE

ROLL CALL DATE 3/6/97

NAME	PRESENT	ABSENT	EXCUSED
SEN. CHUCK SWYSGOOD, CHAIRMAN	✓		
SEN. TOM KEATING, VICE CHAIRMAN	✓		
SEN. LARRY BAER	✓		
SEN. TOM BECK	✓		
SEN. JIM BURNETT	✓		
SEN. B.V. "CHRIS" CHRISTIAENS	✓		
SEN. EVE FRANKLIN	✓		
SEN. LOREN JENKINS	✓		
SEN. GREG JERGESON	✓		
SEN. J. D. LYNCH	✓		
SEN. DALE MAHLUM	✓		
SEN. KEN MILLER	✓		
SEN. ARNIE MOHL	✓		
SEN. LINDA NELSON	✓		
SEN. MIKE TAYLOR	✓		
SEN. DARYL TOEWS	✓		
SEN. MIGNON WATERMAN	✓		

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money is needed, the second sentence addresses it, DPHHS can come in for a supplemental.

CHAIRMAN SWYSGOOD As I understand it, there is this amount of money for reconciliation. We've been told that everything has been reconciled but the question remains, will we have to reimburse the feds later? If the answer is yes, DPHHS will have to pay that out of their current budget. Am I right? **REP. SWANSON** Yes, I encourage you to talk with Mike Billings about this issue.

{Tape: 1; Side: B; Approx. Time Count: 10:35; Comments: None.}

Closing by Sponsor:

REP. SWANSON In conclusion, I direct you to section 6 in the bill which is an amendment we put on in the House as reassurance to the Clark Fork Basin that this money will go to the restoration and compensation in that basin. It's important the State of Montana make a strong statement to Arco that we are here for the duration and will not back out on this lawsuit. Arco has an incentive to delay this as long as possible with the hopes that the legislature will fail in their commitment to see this lawsuit through. I urge you to pass HB 110 as speedily as possible.

{Tape: 1; Side: B; Approx. Time Count: 10:37; Comments: None.}

EXECUTIVE ACTION ON HB 139

CHAIRMAN SWYSGOOD **(EXHIBIT #5)** is a copy of the microcomputer contract process that needs to be put in record.

Amendments: **(EXHIBIT #6)**

Motion: **SEN. LYNCH MOVES TO AMEND HB 139 WITH EXHIBIT #6**

Discussion: **CHAIRMAN SWYSGOOD** This amendment strikes subsections 4 & 5 which deals with direct negotiation.

Vote: **THE MOTION TO AMEND HB 139 CARRIED WITH SEN. KEATING, MILLER, WATERMAN AND TAYLOR VOTING NO.**

SEN. LYNCH I believe they should have been given some flexibility in the bidding process without saying the public has no recourse. It seems these small things being talked about could be addressed by giving yourselves more flexibility.

SEN. BAER We legislators represent the public and are being asked to protect the government from the public with this bill. The approach bothers me, they say trust us but exclude remedies to a complainant. The state better know what they need, exactly what it will cost and where the best pricing and source is or we are being incompetent. I don't believe the government can cover

that incompetence by indemnifying ourselves of liability by way of this bill. I'm concerned with the liability factor.

SEN. TAYLOR Government procurement costs taxpayers 25-35% more than private industry with their bid procedure. Consequently, taxpayers end up paying top dollar because of the system and the way we, as legislators, have laid it out. If you don't mind paying top dollar then we don't need this kind of legislation. If you believe we should save money then we need to come up with a solution that allows that.

SEN. LYNCH Who sets up bid specifications, isn't that done by rule? Couldn't they make the rules flexible, have a legitimate bidding process and save money? As I understand the testimony the suits are over minor things that could have been taken care of when setting up specifications. **Marvin Eicholtz, Department of Administration** It is pretty easy to design the specifications on ordinary procurements. The system works very well in those situations. It gets difficult when we are working on large procurements in something like information technology systems. It is very difficult to know exactly what the specifications should be because we don't know what is going on in the industry as it changes so rapidly. We often rely on the experts within state government and vendors to help us write specifications. We may require something absolutely in a bid and then find it isn't as important as we thought, this is when we round the "square corners". If we don't do that we end up cancelling the whole bid because most of the vendors didn't meet all the specifications and that isn't fair to the vendors.

SEN. LYNCH Wouldn't it be possible to give bidders an additional week to get in something small they may have missed?

CHAIRMAN SWYSGOOD I'm somewhat familiar with the bid process because my business receives bid notices from the state. The bid will state a date for submittal and when it will be opened.

SEN. MOHL About 90% of my work is done by bid and we like the bidding process. We feel when a bid is done you get a fair price.

{Tape: 1; Side: B; Approx. Time Count: 10:57; Comments: None.}

Motion: **SEN. WATERMAN MOVES HB 139 BE CONCURRED IN AS AMENDED.**

SEN. WATERMAN I believe we took out the part of this bill that was most significant. We are spending hundreds of millions of dollars on technology in the state. By the time we get the specs written the technology has changed and we are buying obsolete items. Other states have been able to save significant amounts with different procurement procedures. We are paying top dollar and not getting what the state deserves.

SEN. GREG JERGESON As I understand the testimony, the successful bidder will get the contract and unsuccessful bidders will sue with settlement being payment for profits they would have had if they had gotten the contract. That seems to be an invitation to frivolous lawsuits. I believe we need to pass what is left of this bill.

Vote: **THE MOTION THAT HB 139 BE CONCURRED IN AS AMENDED CARRIED 11-5 ON ROLL CALL VOTE. SEN. JERGESON** will carry HB 139.

{Tape: 1; Side: B; Approx. Time Count: 11:02; Comments: None.}

EXECUTIVE ACTION ON HB 21

Discussion: **Taryn Purdy, LFD** This bill allows "A" accruals to take place but would not allow them to appear in the base budget used for budgeting considerations.

SEN. BECK I believe there was concern during testimony that agencies would spend the money before accruing it into the next year.

Motion/Vote: **SEN. MOHL MOVES HB 21 BE TABLED. THE MOTION CARRIED WITH SEN. KEATING AND JENKINS VOTING NO.**

SEN. EVE FRANKLIN Concern on "A" accruals getting lost was another part of this discussion. We were told the LFD could be directed to speak to those "A" accruals in the narrative. **Ms. Purdy** One other option is to amend SB 19 to require agencies to make that report as part of their budgeting procedure.

DATE 3/6/97

SENATE COMMITTEE ON Finance & Claims

BILLS BEING HEARD TODAY: HB7, HB139, SB374

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Oppose
MARVIN EICHOLTZ	DOA	HB139	✓	
Bill Squires	Montana Tel. Assoc.	HB139		✓
John Tubbs	DNRC	7	✓	
Rob Specter	MSU-Bzn	139	✓	
Laurence Hubbard	State Fund	139	✓	
Bill Grannis	DOA	139	X	
John W Larson	District Judge - Missoula	~~2510~~ 195	X	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.F10

SENATE FINANCE AND CLAIMS
EXHIBIT NO. 5
DATE 3/10/91
BILL NO. HB 639

Office of the Legislative Auditor
MICROCOMPUTER CONTRACT PROCESS
Legislative Request 91L-127
October 7, 1991

In July 1990 the Department of Administration sent out a Request for Proposal to private vendors to bid on a term contract to provide microcomputers to state agencies. This began a process that extended into June 1991. Three term contracts were awarded based on results of the proposal process. At the request of a legislator we reviewed this process to ensure compliance with current statutes and to determine if the process was fair and competitive.

Background

The Request For Proposal (RFP) process is a purchasing method used to receive proposals when it is determined that competitive sealed bidding is either not practicable or not advantageous to the state. This process is administered by the Purchasing Bureau at the Department of Administration. The process includes three separate steps.

First, proposals are solicited from a number of vendors. Purchasing procedures allow additions, deletions, or corrections to a proposal after it has been mailed. Typically these changes are made by a state agency or suggested by a vendor who has noticed a mistake or clarification that is needed. Addenda are then mailed to all the original vendors who were mailed an RFP. The Department can extend the RFP closing date if an addendum is submitted too close to the original closing date.

After the vendors analyze the specifications and submit their proposals, the second step in the process is negotiation of any needed changes or clarifications. Discussions may be conducted with vendors submitting proposals to assure understanding and responsiveness to the requirements. Vendors must be accorded fair and equal treatment with respect to any discussion and revision of proposals. Revisions may be permitted by requesting best and final offers from competitive vendors. The department may require submission of cost or pricing data in connection with an award during this stage.

The third and final stage of the RFP process is award of the contract. Current statutes require the award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state. Price and described evaluation factors are considered during the award decision. No other factors or criteria may be used in evaluation. A request for proposal may also be rejected in whole or in part when it is in the best interests of the state.

Past Microcomputer Contracts

Prior to this current RFP process, there was a term contract with three other vendors to provide microcomputers to state agencies. A term contact is a legal binding agreement between the state and vendor to provide goods or services for an established length of time. The successful bidder has the right to sell an item or product to the state at the established contract price for the period of the contract. The past contracts were initially designated for one year but were extended until new contracts were approved. The past contracts could by used voluntarily by state agencies in order to take advantage of volume price savings.

These past contracts were also negotiated using the RFP process also. The evaluations were done by Information Services Division staff at the Department of Administration due to staff expertise and experience in this area. This division is also responsible for monitoring data processing equipment throughout state government. The RFP process is frequently used to establish these contracts.

The New Contracts

In order to standardize computer systems throughout state government, state agencies are requested to utilize the new microcomputer term contracts. The new contracts offer an extensive range of options and capabilities in an attempt to address all potential needs of agencies. There are also various price differences between the offered categories and between the different vendors. Agencies may select between one of three vendors under the term contract.

To order equipment from a vendor that does not have a term contract with the state, agencies must obtain written approval from the Information Services Division at the Department of Administration.

Our Review of the Proposal Process

To conduct our review of this RFP process we examined all available documentation to reconstruct major events and changes. We reviewed all bids that were submitted and their supporting documentation. We also conducted interviews with state agency personnel and with a sample of vendors to obtain their input. We researched related purchasing laws and policies to determine RFP requirements. We did not evaluate the technical aspects of the equipment tests that were performed. The following information outlines our answers to key questions raised about this process.

WERE ALL VENDORS TREATED EQUAL DURING THIS RFP PROCESS?

The RFP was sent to 122 vendors who were on the vendor list maintained at the Purchasing Bureau in the Department of Administration. There were also several vendors not on the list who requested copies of the RFP. Sixteen different vendors responded. It appears all qualified vendors were afforded the opportunity to bid on this contract and no vendor was restricted from bidding.

The evaluation criteria was generally outlined before the actual scoring took place. The same criteria was applied to all vendors. Scoring and evaluation sheets for each separate evaluation area were developed. As outlined in the RFP, the evaluation was divided into three main areas: service, price, and technical. There were three separate teams performing evaluations in these areas. We reviewed all scoring requirements and formulas and determined if they complied with the original requirements outlined in the RFP. Department reviews were done independently and then discussed with the evaluation committee. All major decisions were made by the whole committee.

There were several events which required committee decisions. For example, the bid closing date was extended two different times. The first extension was at the request of several vendors who indicated additional clarification was needed and additional time would be needed to address the complexity of this bid. The second extension date was at the request of the Montana University System. It was brought to the attention of the committee that the original RFP did not address some of the university requirements. In order to address all state agencies and encourage use of the term contracts at the university units, it was decided to accommodate their request. It was decided this extension was in the best interests of the state.

Another decision by the committee was to change the point distribution for service evaluations. The original point schedule allotted full points for all vendors meeting minimum requirements. Due to the level of competitiveness, most vendors met these minimum requirements. There was no reward for those vendors who offered services beyond the minimum requirements. So the committee changed the point schedule in November to weight key areas more. Additional specifications in these areas were then outlined prior to submission of best and final offers.

Overall, we believe the process treated each vendor equally. There were some time delays and changes that could have been reduced if more adequate planning had occurred prior to the RFP process. More agency involvement and input for RFP requirements could have prevented the second closing date extension. Department staff also underestimated the level of interest and competitiveness of vendors. As a result, they had committed limited staff resources and planning to this process. Staff turnover at the Department level hindered

communication and slowed the process. The changes in the RFP process did not appear to impair any one vendor.

IS IT LEGAL FOR THE TERM CONTRACT TO EXTEND FOR UP TO TEN YEARS?

The Department is allowed to contract for telecommunications equipment and systems, data processing equipment, and the medicaid management information system for a "period not to exceed 10 years". This requirement is outlined in the section 18-4-313, MCA and is contingent on the availability of funds and contract requirements being met. Since this contract is for data processing equipment it appears to be in compliance with current statute.

The new term contracts are designated for a three year period. At that time each contract will be evaluated and renegotiated. Annual contract renewals can be obtained for an additional seven years. Any of the contracts could be canceled during these annual evaluations.

WERE QUALIFIED PERSONNEL PERFORMING THE EVALUATIONS?

We reviewed the personnel files for all department personnel who were involved in the RFP process. We found the majority of staff had extensive microcomputer equipment experience. There were also several staff who had considerable experience with purchasing requirements for this type of equipment. Scoring information was reviewed by evaluation supervisors. Evaluation supervisors had been involved in previous RFP processes for microcomputer term contracts.

We interviewed a sample of vendors and Montana State University staff that were involved in the process to determine their perception of staff qualifications. Most vendors contacted were comfortable with the skills of evaluation staff. MSU staff indicated the technical expertise of department staff appeared to be more than adequate. Overall we found staff were qualified to perform the evaluations.

DID SPECIFIC STAFF INFLUENCE THE PROCESS?

There were ten different department staff members involved in the process along with three MSU personnel. We reviewed all written documentation, examined staff phone records, interviewed committee members, and met with individual vendors. Most communication was done through formal, written documents. We were told this was done to prevent any advantage to any one vendor and to ensure all vendors were notified of any changes. We found no indication of any one person influencing the process or decisions. All areas were

evaluated independently. All formal decisions were made by the committee as a whole.

WERE BIDS AND EQUIPMENT KEPT SECURE AT ALL TIMES?

We toured the rooms where bids and equipment were kept and evaluated at the Department and at MSU. We interviewed department staff and vendors to note any concerns they had in this area. One vendor indicated it's bid was observed unattended in an open area during the evaluation process. Other vendors indicated no problems with security. In addressing the specific concerns of the vendor the Department provide the following response:

> "Two...representatives who complained about a possible breach of confidentiality viewed the proposal through a sealed and covered hallway window. A Department supervisor immediately investigated the initial complaint. It was discovered that about one inch of the window was uncovered making a box of proposals partially visible. The proposals were in a box in an office that is occupied by four employees. This was not an empty room but the workspace of an evaluation team member."

WAS THE IN-STATE BIDDERS PREFERENCE APPLIED UNIFORMLY?

The in-state bidders preference was determined by the department's designated purchasing agent. Vendors are required to request this preference or have a specified form on file with the Department. The purchasing agent documented the preference early in the process and it was applied uniformly throughout the process. On the final scoring documents the preference was incorrectly described as the Made in Montana preference. This was not the preference applied, only the in-state bidders preference was applied to vendors.

This preference was applied in the price evaluation only. It was included in the points formula used by staff in this area. We reviewed this formula and determined all identified vendors were awarded the appropriate preference.

WERE SIMILAR TECHNICAL TESTS APPLIED TO ALL EQUIPMENT?

We reviewed all equipment evaluation sheets completed by the Department and those utilized by University staff. We did find that some equipment was not tested. Each machine started with 100 percent of available points. Points were then subtracted in areas where tests illustrated problems. Due to limited resources, vendor tests extended throughout the process. This resulted in evaluations in the service and price areas being completed prior to equipment tests for some vendors. (See Attachment #1) Because of this timing sequence the technical evaluation staff were aware that some vendors

were no longer competitive because they were unable to offer the warranty and services outlined by other vendors. Overall, their machines were not tested. Testing of these machines would have further extended the time delay. This decision did not penalize any vendors. Due to the competitiveness of the remaining vendors, points in the pricing portion of the bid process were the primary factor.

We reviewed the scoring sheets for a sample of machines from several vendors. We noted some inconsistencies in documentation. Some models were in use by state agencies and department staff were familiar with their operations. Limited tests were performed on these machines according to evaluation staff. The justification for this inconsistent testing was not documented in the evaluation sheets. It does not appear this change in testing benefitted any one vendor. In fact, it appears to have reduced points for one of the successful vendors.

WHAT WAS THE INVOLVEMENT OF MSU IN THE RFP PROCESS?

Due to limited communication from Department staff, MSU staff did not provide input on their data processing needs prior to release of the RFP. One of the vendors notified MSU of compatibility problems the universities would have with the original RFP requirements. MSU staff then worked with Department staff to develop more comprehensive specifications in order to encourage term contract use at the university level. The compatibility problem would also have been a concern for several other state agencies. The evaluation committee decided to change the RFP specifications to promote more uniform standardization of equipment throughout the state and potentially increase cost savings.

The Department of Administration has authority to use expert advice and assistance from other state agencies as outlined in section 18-4-233, MCA. The Department contacted several state agencies to determine if they were interested in being involved in the RFP process. The Department of Labor and Industry reviewed bid proposals and provided written comments to assist the evaluation committee.

Department staff determined the technical expertise and equipment requirements could be more adequately evaluated at the University level. MSU staff were involved in the equipment testing in this area only. They were not aware of the type or amount of testing done at the Department of Administration until later in the process. This testing was for a portion of the points within the technical evaluation.

DID UNIVERSITY SPECIFICATIONS FAVOR ONE VENDOR?

We interviewed a sample of vendors and reviewed evaluation documentation to determine if this was a concern. None of the vendors interviewed felt the specifications favored any of the vendors. We noted MSU only did testing specific to their needs and this accounted for a small portion of the technical evaluation. The majority of testing was performed at the Department of Administration within the Information Services Division. One machine did not pass the testing done at the university level. There were several machines which had problems but university staff afforded all vendors the opportunity to correct any problems identified. It does not appear the additional specifications outlined by the university favored any one vendor.

WHY WAS ONE OF THE SUCCESSFUL VENDORS ALLOWED TO CORRECT A TECHNICAL PROBLEM IDENTIFIED DURING CONTRACT NEGOTIATION?

As mentioned earlier, the technical testing extended throughout the process due to the limited staff resources. Because of this scheduling, some vendors' equipment was still being evaluated during the best and final stage of the process in March 1991. (See Attachment #1) The first equipment was tested in November 1990. All vendors were offered the opportunity to correct any problems identified. In order to be fair, vendors who were tested later were afforded a specified length of time to correct any identified problems. One of these vendors was a successful bidder based on the points awarded. During the technical evaluation the vendor had notified the evaluation committee the identified problem was already being addressed. The committee gave the vendor a 30 day time limit. The problem was addressed during the specified time limit and the equipment was re-tested to ensure compliance.

WHY WAS THERE A TIME DELAY IN RELEASING THE BID INFORMATION?

There were several reasons for the delay in releasing the supporting documentation for this process. The current statutes, section 18-4-304, MCA require all information not be made public until the final contract has been executed. Although three successful bidders were identified during April 1991, the actual contracts were not executed at that time. Separate negotiations had to be held with all three vendors to standardize contract language, etc. One vendor was addressing the technical problem described above. Another vendor was in the process of being audited by the General Accounting Office. These events created time delays in contract negotiations and release of any supporting documentation. Prices did not change during this time period.

Conclusion

During the course of our review, there were also several other questions raised by various vendors we contacted. Some of these questions related to possible inequities of service evaluations, past performance with state agencies, etc. We reviewed information relating to these areas to determine if there were any additional concerns.

Generally, we have found this RFP process to be in compliance with current purchasing statutes and requirements. There were some problem areas that could be addressed to create a more effective purchasing process but this did not effect any one vendor. We found there was limited communication with other state agencies prior to release of the proposal. Vendors have indicated this bid was more complex and in-depth than previous RFPs. They also indicated the response time allowed for the best and final offers (two weeks) was very limited based on the amount of time the Department was allowed for their review. It does not appear the Department of Administration gave agencies adequate notice of requirements that were going to be requested from vendors. We found the written procedures for the Purchasing Bureau do not provide detailed guidelines in some areas and need to be updated in other areas. Staff turnover created some internal communication delays. These problems may be some of the reasons the process was so time consuming and complicated. Department staff should consider more extensive planning and specific evaluation criteria during the next process.

We have been requested by the Legislative Audit Committee to conduct a performance audit this fall regarding purchasing bid specifications. During this audit, we will further examine some of these areas and address them with Department personnel.

SENATE FINANCE AND CLAIMS
EXHIBIT NO. 6
DATE 3/10/97
BILL NO. HB 139

Proposed Amendment to HB 139.03
Introduced by Swysgood
Senate Finance and Claims
March 10, 1997

1. Page 15, line 22 through line 29
Strike: Subsection (4) in its entirety

2. Page 15, line 30 through page 16, line 6
Strike: Subsection (5) in its entirety

SENATE STANDING COMMITTEE REPORT

March 10, 1997

MR. PRESIDENT:
We, your committee on Finance and Claims having had under consideration House Bill 139 (third reading copy -- blue), respectfully report that House Bill 139 be amended as follows and as so amended be concurred in.

Signed: _____
Senator Chuck Swysgood, Chair

That such amendments read:

1. Title, lines 18 and 19.
Following: "~~AND~~"
Strike: "~~,~~"
Insert: "AND"
Following: "DATE" on line 18
Strike: remainder of line 18 through "DATE" on line 19

2. Page 15, line 22 through page 16, line 6.
Strike: subsections (4) and (5) in their entirety

3. Page 26, lines 27 and 28.
Strike: section 24 in its entirety
Renumber: subsequent sections

-END-

Amd. Coord.
Sec. of Senate

Senator Carrying Bill

521453SC.STS

MONTANA SENATE
1997 LEGISLATURE
FINANCE AND CLAIMS COMMITTEE

ROLL CALL DATE 3/10/97

NAME	PRESENT	ABSENT	EXCUSED
SEN. CHUCK SWYSGOOD, CHAIRMAN	✓		
SEN. TOM KEATING, VICE CHAIRMAN	✓		
SEN. LARRY BAER	✓		
SEN. TOM BECK	✓		
SEN. JIM BURNETT	✓		
SEN. B.V. "CHRIS" CHRISTIAENS	✓		
SEN. EVE FRANKLIN	✓		
SEN. LOREN JENKINS	✓		
SEN. GREG JERGESON	✓		
SEN. J. D. LYNCH	✓		
SEN. DALE MAHLUM	✓		
SEN. KEN MILLER	✓		
SEN. ARNIE MOHL	✓		
SEN. LINDA NELSON	✓		
SEN. MIKE TAYLOR	✓		
SEN. DARYL TOEWS	✓		
SEN. MIGNON WATERMAN	✓		

SEN:1997
wp.rollcall.man
CS-09

MONTANA SENATE
1997 LEGISLATURE
FINANCE AND CLAIMS COMMITTEE
ROLL CALL VOTE

DATE 3/10/97 BILL NO. HB139 NUMBER

MOTION: BCCAA

NAME	AYE	NO
SEN. CHUCK SWYSGOOD, CHAIRMAN	✓	
SEN. TOM KEATING, VICE CHAIRMAN	✓	
SEN. LARRY BAER		✓
SEN. TOM BECK	✓	
SEN. JIM BURNETT		✓
SEN. B.F "CHRIS" CHRISTIAENS	✓	
SEN. EVE FRANKLIN	✓	
SEN. LOREN JENKINS		✓
SEN. GREG JERGESON	✓	
SEN. J. D. LYNCH		✓
SEN. DALE MAHLUM	✓	
SEN. KEN MILLER	✓	
SEN. ARNIE MOHL	✓	
SEN. LINDA NELSON		
SEN. MIKE TAYLOR	✓	
SEN. DARYL TOEWS		✓
SEN.MIGNON WATERMAN	✓	
	11	5

SEN:1997
wp:rlclvote.man
CS-11

DATE 3/10/97

SENATE COMMITTEE ON Finance & Claims

BILLS BEING HEARD TODAY: HB 110

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Oppose
Paul Sihler	FWP	HB110	X	
Judy Browning	GOV OFF	HB110	X	
ALICIA JANACARO	MT MINING ASSN	HB110		X
Joe Marnek	Attorney General	HB110	X	
Chris Tweeten	DOJ	HB110	X	
Geoff Smith	CFPOC	HB110	X	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.F10